BEFORE THE DEPARTMENT OF INSPECTIONS AND APPEALS

CP # 08-90-20065
DIA # 96 ICRC – 3

EDWARD D TILLMAN,
Complainant,

and

IOWA CIVIL RIGHTS COMMISSION

v.
MONFORT OF COLORADO, INC., CON AGRA, and BRET GOKEN.

SUMMARY

This matter came before the Iowa Civil Rights Commission on the Complaint filed by Edward D. Tillman against the Respondents Monfort of Colorado, Inc., Con Agra, and Bret Goken. Mr. Tillman alleges that he was subjected to race discrimination in employment.

Complainant Tillman, a Black male, alleges that all Respondents are liable for a racially hostile work environment which was inflicted on him by Respondent Bret Goken and other coworkers. He also alleges that he was discriminatorily discharged by Respondents Monfort of Colorado, Inc. and Con Agra (*hereinafter* "Respondents Monfort" or "Monfort"). His complaint specifically alleges that, during an altercation at lunch with a coworker, Respondent Bret Goken, he was called "nigger" by Goken. Tillman then reacted by slamming Goken into a table. While both of them were discharged for this incident, Goken was subsequently reinstated, while Tillman was not. Complainant Tillman alleges this constitutes racial discrimination by Respondents Monfort of Colorado, Inc. and Con Agra in his discharge. The question of racial harassment of Complainant Tillman by Goken and other coworkers was also addressed during these proceedings. Issues raised by this allegation include whether Respondents Monfort of Colorado, Inc. and Con Agra were aware of the harassment and took appropriate remedial measures to end it.

A public hearing on this complaint was held on August 21-23, 1995 before the Honorable Donald W. Bohlken, Administrative Law Judge, at the Marshall County Courthouse in Marshalltown, Iowa. The Respondents Monfort were represented at hearing by John K. Vernon, Attorney. The Respondent Bret Goken did not appear and was not represented. The Iowa Civil Rights Commission was represented by Teresa Baustian, Assistant Attorney General. The Complainant, Edward Tillman did appear, but was not represented by counsel.

The Respondents Monfort filed a Hearing Brief on August 17, 1995 which was submitted by attorneys John K. Vernon and David S. Steward. The Commission's Posthearing Brief, submitted by assistant attorney general Teresa Baustian, was received on November 3, 1995. The

Respondent's Posthearing Reply Brief, submitted by attorneys Russell L. Samson and John K. Vernon, was received on December 19, 1995. Respondent Goken filed no brief.

The Commission proved Complainant Tillman's allegations of racial harassment against Bret Goken. The Commission failed to prove the allegations of racial harassment and racially discriminatory discharge against Respondents Monfort.

The Commission established its case of harassment against Respondent Bret Goken by establishing the first four of the following five elements. The Commission failed to prove, however, the allegation of harassment against Respondents Monfort because they failed to prove the fifth element:

> a. that Complainant Tillman is Black and is therefore a member of a class protected against race discrimination;
>
> b. that he was subjected to harassment by Respondent Goken and other employees of Respondents Monfort of Colorado, Inc. and Con Agra. This was adverse conduct which he regarded as uninvited and offensive and which any reasonable person would regard as offensive;
>
> c. that this harassment was based upon his race, i.e. because he is Black;
>
> d. that this harassment created a hostile or abusive work environment; and,
>
> e. that Respondents Monfort of Colorado, Inc. and Con Agra through their agents and managers, knew or should have known of the harassment and failed to take prompt, appropriate, and effective remedial action.

The Commission also failed to prove that Complainant Tillman was subjected to racially discriminatory treatment in his discharge as the preponderance of the evidence indicates he was not treated any differently than non-Black employees who were discharged for fighting. His attack on Respondent Goken was not justified by the purely verbal harassment he received from Goken.

Remedies awarded include $8500.00 for emotional distress damages resulting from racial harassment by Respondent Goken and other coworkers.

FINDINGS OF FACT:

I. JURISDICTIONAL AND PROCEDURAL FACTS:

A. Subject Matter Jurisdiction:

1. Complainant Tillman, a Black male, alleges that, during an altercation at lunch with a coworker, Respondent Bret Goken, he was called "nigger" by Goken. Tillman then reacted by slamming Goken into a table. While both of them were discharged for this incident, Goken was

subsequently reinstated, while Tillman was not. Complainant Tillman alleges this constitutes racial discrimination by Respondents Monfort of Colorado, Inc. and Con Agra in his discharge. (Notice of Hearing). The question of racial harassment of Complainant Tillman by Respondent Goken and other coworkers was also addressed during these proceedings. Issues raised by this allegation include whether Respondents Monfort of Colorado, Inc. and Con Agra were aware of the harassment and took appropriate remedial measures to end it. For reasons stated within the conclusions of law, these allegations of racially discriminatory discharge and harassment are within the subject matter jurisdiction of the Commission. See Conclusions of Law Nos. 8-9.

B. Procedural Matters:

1. Timeliness:

2. Complainant Tillman filed his complaint against the Respondents with the Iowa Civil Rights Commission on July 26, 1990. The date of the altercation which resulted in Complainant Tillman's discharge is given as May 25, 1990. Since the termination occurred after that date, it is clear that the complaint was filed less than one hundred eighty days after the last alleged act of discrimination.

2. Procedural Prerequisites for Hearing:

3. The complaint was investigated. (Notice of Hearing). The Commission and Respondents Monfort and Con Agra stipulated that probable cause was found with respect to both the racial harassment and termination. (Tr. at 593-94). Conciliation was attempted and failed. Notice of Hearing was issued on December 16, 1994. (Notice of Hearing).

3. Racial Harassment Issue Was Properly Raised With Respect to Respondents Monfort of Colorado, Inc. and Con Agra:

4. On their posthearing brief, Respondents Monfort of Colorado, Inc. and Con Agra (hereinafter referred to jointly as "Respondents Monfort" or "Monfort") suggest that the issue of racial harassment is not "properly raised or appropriately before the agency for decision." (Respondents' Monfort's Posthearing Brief at 28). The argument is based on the proposition that "the complainant made absolutely no mention of a claim of a 'hostile work environment [in his complaint]. . . . The Commission inserted the issue of Mr. Tillman's allegedly 'hostile' or 'abusive' work environment into this proceeding by way of an attempt to 'excuse' what would otherwise be a clearly dischargeable offense." (Respondents Monfort's Posthearing Brief at 28).

5. Respondents Monfort's characterization of the complaint is in error as page one of the complaint indicates "Race" is the basis of Tillman's complaint, "Employment" is the area of jurisdiction of the complaint, and "Harassment/Termination" are the terms and conditions of employment alleged to be affected by the complaint. In addition, page 3 of the complaint sets forth an allegation that, on May 25, 1990, in Respondent's cafeteria, Respondent Goken directed the epithet "fuck you nigger" in response to Complainant Tillman's telling him to "get the fuck out of my face." (Notice of Hearing). (Since these statements are given in a "correction" handwritten after the typed text of the complaint, it is unclear from the face of the complaint

whether this correction is intended to replace a statement, underlined by hand, indicating that "Goken kept calling me a nigger" at the cafeteria or whether the "correction" is intended to be added to that statement. However, since Complainant Tillman testified that Respondent Goken called him "nigger" once at the cafeteria, it would appear that the correction was intended to replace the statement indicating that Goken repeatedly used the epithet at that location and time.) (Tr. at 143).

6. Respondents Monfort's suggestion that the issue was not properly raised or appropriately before the Commission for decision also disregards certain facts beyond the allegations set forth in the complaint. First, as previously noted, Monfort and the Commission stipulated on the record that the internal administrative law judge made a finding of probable cause with respect to both the allegations of racial harassment and termination. See Finding of Fact No. 3.

7. Second, on July 14, 1995, Respondents Monfort filed a Prehearing Conference Form with the Commission which stated the following with respect to the issues:

> Issues Raised by Complainant:
>
> - Racial harassment by co-workers.
>
> - Race was a factor in decision to discharge Complainant.
> Defenses of Respondent:
>
> - Respondent was unaware of racial harassment towards Complainant.
>
> - Complainant was discharged pursuant to company policy against fighting on company property.
>
> Jurisdictional Issues:
>
> - None.

(Prehearing Conference Form of Respondents Monfort). Thus, Respondents Monfort's own prehearing conference form makes it clear that they recognized, prior to hearing, that alleged racial harassment was one of the issues in the case. It also notes that there are no jurisdictional issues, thereby indicating that Respondent had no issues concerning personal jurisdiction, i.e. notice of the issues to be tried. See Conclusion of Law No. 16.

8. Third, on August 17, 1995, four days prior to the hearing, Respondents Monfort filed a "Hearing Brief" with the Commission. On page 3 of that brief, Respondents listed the issues being tried. Among the issues listed are: "(1) Was Tillman subjected to a racially hostile work environment?" and "(2) Did Monfort know or should have known of the alleged harassment and fail to take remedial action?". At no point in the brief do Respondents Monfort suggest that the issue of racial harassment or a racially hostile work environment was not properly raised or appropriately before the Commission.

9. Fourth, throughout the hearing, testimony was elicited by the Commission's representative concerning the issue of alleged racial harassment of Complainant Tillman and others. Throughout the hearing, no objection to such testimony was made by Respondents Monfort based on the propositions that they either had no notice or that the issue was not properly raised before the Commission. Indeed, Monfort introduced evidence to defend against it. No such objection was made until the filing of Respondents Monfort's posthearing brief, on December 19, 1995. four months after the hearing.

10. Finally, the allegation of racial harassment is reasonably related and closely related to the other allegations set forth in the complaint. There is evidence in the record indicating that the statement by Goken at the cafeteria was part of a practice of racial harassment by him and others directed against Complainant Tillman. (Tr. at 128-32, 140-43). There is also evidence that this harassment provoked Tillman to slam Goken's head into the cafeteria table, the action which led to Tillman's discharge. (Tr. at 143). See Finding of Fact No. 37. For reasons stated in the Conclusions of Law, it is found that the issue of racial harassment was properly before the Commission. See Conclusions of Law Nos. 11-19.

4. Respondent Bret Goken Received Notice of Hearing and of the Trial of the Issue of Racial Harassment:

11. Respondent Bret Goken did not appear at hearing. Respondent Goken was served by certified mail with a copy of the Notice of Hearing at his home address on April 1, 1995. Official notice is taken of the certified mail return receipt establishing this fact. See Conclusion o f Law No. 7.

12. The Notice of Hearing states "[s]pecifically Complainant alleges that Respondent[s] violated Iowa Code section 601A.6 (now 216.6) as stated in the complaint, . . . copies of which are attached and incorporated by reference as if set out fully herein." The notice also provided the time, place and nature of the hearing. Respondent Goken was notified of a subsequent continuance by a scheduling conference order which provided the time and place of the continued hearing.. (Scheduling Conference Order).

13. The complaint, which is attached to and incorporated in the Notice of Hearing by reference states:

In the area of employment, I believe I have been discriminated against on the basis of race (Black), in violation of Chapter 601A Code of Iowa.

> I believe my race was a factor in the following incidents:
>
> 1. On May 25, 1990, a white co-worker, Mr. Bret Goken, trimmer, during lunch break kept calling me a "nigger." I grabbed him and slammed him against the table. We were both called into the office and we were terminated. However, Mr. Goken was reinstated into his job and was to start work on July 16, 1990. I know of two (2) other white employees that were fighting on the job. They were both called into the office and they were only separated from each other.

> [Omitted allegation on missing equipment on which was not tried at hearing, apparently because no probable cause was found with respect to it.]
>
> [The following is handwritten]
>
> Correction: I said get the fuck out of my face. He said fuck you nigger.

(Notice of Hearing). As previously noted, the complaint specifically alleged "harassment/termination" on the basis of race in the area of employment. See Finding of Fact No. 5 It is self-evident that the only action by Mr. Goken specifically alleged in the complaint is his reference to Complainant Tillman as a "nigger." For reasons set forth in the conclusions of law, the use of racial epithets by coworkers against a Black employee could constitute racial harassment which violates Iowa Code section 216.6. See Conclusions of Law Nos. 41, 46.

14. The above facts are sufficient to show that Respondent Goken received notice of this hearing and that the issue of his liability for racial harassment of Complainant Tillman was to be tried. See Conclusions of Law Nos. 20-21. There are additional facts which support this conclusion. As previously noted, probable cause was found with respect to racial harassment in this case. See Finding of Fact No. 3. For reasons stated in the conclusions of law, it may be presumed that, in accordance with regular functioning of the Commission and routine adherence to its rules, the probable cause finding on harassment was transmitted to Respondent Goken. Also, the Commission's and Respondent's Prehearing Conference Forms, both of which state that copies of the completed forms must be sent to unrepresented parties, indicated that racial harassment was an issue. (Prehearing Conference Forms). In accordance with the statutory prohibition against ex parte communications between the parties and the Administrative Law Judge, it may be presumed that copies of these forms were sent to Respondent Goken. See Conclusion of Law No. 21.

5. Respondents Monfort Failed to Raise the Issue of Laches Either Prior to or at the Hearing and Failed to Prove That They Were Prejudiced By Delay Which Was the Fault of Either The Commission or the Complainant:

15. On posthearing brief, Respondents Monfort raise, for the first time in these proceedings, the issue of laches by the Complainant or the Commission. (Respondents Monfort's Posthearing Brief at p. 29, n. 29). This issue was mentioned neither in Respondents Monfort's hearing brief nor in its Prehearing Conference Form nor any time prior to or during hearing. For reasons stated in the conclusions of law, this alone compels the conclusion that Monfort waived its claim of laches. See Conclusion of Law No. 31.

16. Without citation to any legal authority, Respondents Monfort argue that interest should not be awarded in this case due to "delays that were solely in the power of the Agency and the complainant to remedy." (Respondents Monfort's Posthearing Brief at 29, n. 29). While the passage of time from the filing of the complaint on July 26, 1990 to the hearing in August of 1995 is shown in the record, there is no evidence in the record to establish that such delays were the sole fault of the Commission and/or the complainant. For reasons set forth in the conclusions

of law, evidence of this passage of time is also not sufficient to show unreasonable delay or material prejudice to Monfort. See Conclusions of Law Nos. 35-36.

17. While Respondents Monfort suggest that the testimony of 40 to 50 Black employees at the Monfort Pork Plant, "the great bulk of whom are unlocatable due to turnover and the passage of time" would have been relevant with respect to racial harassment, there is no evidence that their testimony would have been favorable to Monfort. (Respondents Monfort's Posthearing Brief at 29). There is also no evidence in the record to the effect that these employees are unlocatable or that any efforts were made to locate them. Thus, there is no evidence to support this argument that Respondents Monfort were materially prejudiced by the absence of this supposedly unavailable testimony.

II BACKGROUND:

A. Complainant's Background:

18. Complainant Edward Tillman, a Black male, was employed full-time as a production worker at Respondents Monfort in Marshalltown, Iowa from September or October of 1989 until he was discharged effective May 25, 1990. (CP. EX. 2; Tr. at 117, 274, 706). He had previously been employed for almost five years in another packing facility in Garden City, Kansas. (Tr. at 116). He began work on the loin line as a loin trimmer. This line is on part of the production facility known as the cut floor. The cut floor, which is the general area where Complainant Tillman always worked, is accurately depicted in the map of the cut floor entered into evidence as Complainant's Exhibit 1. (CP. EX. 1; Tr. at 117, 480). He was in loin trimmer position for three to four weeks before he was moved to the "'main break" or "main line" on the cut floor. (CP. EX. 1; Tr. at 120-21). On the main break, Complainant Tillman began hooking sides. By May of 1990, and possibly before, he was also trimming hams. (Tr. at 117, 121, 135). This took place on an elevated station where Tillman could see the entire cut floor except for the rib and belly lines. (Tr. at 136). With the exception of seven or eight days when Complainant was on light duty, he spent the remainder of his employment hooking sides and trimming hams. (Tr. at 134). His locations on the cut floor when hooking sides and when trimming hams are marked, respectively, on Complainant's Exhibit 1 by his initials and his circled initials. (Tr. at 122, 136).

B. Respondents' Background:

1. Respondents' Monfort's Background:

19. Respondents Monfort, named in the complaint as "Monfort of Colorado, Inc." and "Con Agra," admit, on brief, that Con Agra is a foreign corporation licensed to do business in Iowa. It operates under the name, among others, of "Monfort". (Notice of Hearing; Respondent's Monfort's Hearing Brief at 2). Respondents Monfort operate a hog processing facility in Marshalltown, Iowa known as the Monfort Pork Plant. (Respondents Monfort's Hearing Brief at 2; Tr. at 703, 705). Respondents Monfort bought fifty percent of the plant in 1987 and the remainder in 1988. (Tr. at 705).

20. In 1990, the plant manager was Lincoln Woods, a Black male. (Tr. at 705, 733). Bary Carl, personnel manager, a white male, reported directly to Mr. Woods. (Tr. at 705-706). The line of authority in 1990 from Complainant Tillman to Lincoln Woods was: production worker (Complainant Tillman)-->production line supervisor (Dean Welton, white male or Mike Slifer, white male)-->general foreman (Charlie Freese, white male)-->operations manager--->plant manager (Lincoln Woods). (Tr. at 121, 472, 479, 481, 571, 572, 596, 603-04, 706).

21. There is some confusion in the record as to who Complainant Tillman's immediate supervisor was in May of 1990. Complainant Tillman and Bary Carl both testified that Tillman's supervisor after he moved to main break was Dean Welton. (Tr. at 121, 802). Dean Welton testified that, although Tillman was on the main line, which was Welton's area of supervision, Tillman performed a butt line job under Mike Slifer. (Tr. at 598-99, 603-04). Mike Slifer testified that he was the supervisor of the picnic line from October of 1989 to May of 1990 and had nothing to do with the shoulder or butt line. (Tr. at 473, 479, 481). Bary Carl's notes indicate that, after the altercation of May 24, 1990, Complainant Tillman and Bret Goken were "brought to the personnel office by their supervisors." The only supervisors listed as being present are Dean Welton and Mike Slifer. (R. EX. M, N). The identity of the operations manager at that time is not shown in the record.

22. The Monfort Pork Plant is a unionized facility. The production and maintenance employees in the bargaining unit are represented by Local 50N of the United Food and Commercial Workers International Union (UFCW). (Joint EX. 1). There are multiple union stewards in each department, as well as various union officials throughout the plant. (Tr. at 800). The bargaining agreement includes a non-discrimination clause which bars race discrimination by either Monfort or the union. The agreement also provides for a three step grievance procedure to process grievances "pertaining to a specific violation of the Agreement, or violation of employee's working conditions." Thus, the grievance is presented in consecutive steps to: (Step 1) the department or shift superintendent; (Step 2) the personnel director and the department or shift superintendent; and (Step 3) the plant manager. Grievances concerning discharges commence at the third step. If the matter is not settled at the third step it proceeds to a "Pre-Arbitration Hearing" before the Company Industrial Relations Division. In the event the matter is not settled there, it may be taken to arbitration. (JOINT EX. 1).

22A. The employee information packet or handbook sets forth the following policies with respect to horseplay, fighting and racial harassment:

> GENERAL RULES
>
> There are other general rules which we must all abide by to make your workplace run smooth and be a pleasant place to work. Violation of these rules is considered to be a major infraction, and each of them are dischargeable offenses.
>
> . . .
>
> HORSEPLAY - Horse play is a serious offense because it generally leads to injury of an innocent bystander. Spraying water, throwing product, pushing and

shoving, and other forms of horseplay can result in an accident, so it is expressly forbidden.

. . .

FIGHTING - No fighting is allowed anywhere on Company property. If you are having a problem with another employee, see your Supervisor, the Personnel Department, or your Union Steward, and we will get the problem resolved before it escalates into a fight.

. . .

RACIAL/SEXUAL HARASSMENT - No form of racial or sexual harassment toward another employee will be tolerated. This would include comments with a sexual connotation, racial slurs, or touching another employee. Treat others as you expect to be treated.

(R. EX. AB). In May of 1990, this policy would have been posted at 4-5 bulletin boards in the plant. (Tr. at 474-75, 713).

22B. Further definition of the policy for handling fighting and horseplay was agreed to by the union and management following a strike in 1986. The old policy had required that both participants in a fight be discharged. (Tr. at 107-08, 649-50). The new policy was, at various times, posted. (Tr. at 653). It states, in part:

POLICY ON FIGHTING

. . .

l Fighting among employees is expressly forbidden and will not be tolerated.

In the event that two employees are involved in an altercation the following procedure will be used:

1. Both employees will be suspended pending an immediate investigation by a joint Company-Union investigation team.

2. When the facts of the situation are known, the Company will make a decision as to what action will be taken.

3. A meeting will be held with both parties. If both parties are equally guilty of physical aggression, both parties will be discharged. If one party was the aggressor, and the other party only defended himself, the aggressor will be discharged. If neither party is guilty of physical aggression and the altercation was verbal, both parties will be reprimanded with the understanding that further recurrences will result in discharge.

POLICY ON HORSEPLAY

> Horseplay on the job cannot be tolerated. Effective immediately, anyone guilty of horseplay will be reprimanded on first occurrence and discharged after the second occurrence.

(Joint EX. # 2).

2. Respondent Bret Goken's Background:

23. Respondent Bret Goken, a white male individual or person, was a production worker who began work at the Monfort Pork Plant on June 5, 1989. (CP. EX. 8; Tr. at 724). In May of 1990, he was working on the butt line on the cut floor. (CP. EX. 8; Tr. at 138-39). Respondent Bret Goken left his employment with Monfort on January 8, 1992. (CP. EX. 8).

II. RACIAL HARASSMENT:

A. Complainant Is A Member of A Protected Class:

24. Complainant Tillman is a Black person and is, therefore, a member of a class protected from race discrimination by the Iowa Civil Rights Act. This fact is admitted by Respondents Monfort. See Finding of Fact No. 3. (Respondents Monfort's Post-Hearing Reply Brief at p.3, n.3; p. 29 n.28). (It should be noted that Respondents Monfort stipulated that witnesses Complainant Tillman, Caroline Tillman, Eugene Phillips, and Tracey Harrington are all African-American.) (Respondents Monfort's Post-Hearing Reply Brief at p.3, n.3).

B. Complainant Tillman Was Subjected to Unwelcome Racial Harassment, I.e. Adverse Conduct Regarded by Him As Unwelcome and Reasonably Considered to Be Undesirable or Offensive:

25. Complainant Tillman was the subject of repeated acts of verbal racial harassment, and one act of physical harassment, perpetrated by his coworkers, including but not limited to Respondent Bret Goken.

26. Complainant Tillman had no problems with his coworkers until he got on the main break area. (Tr. at 126). At that point, while he was hooking sides, he would repeatedly be called racist names by the loin pullers, including "coon, boy, nigger." One of these individuals was described as a blond white male, whose name Tillman apparently does not know, who referred to Tillman as a "coon". Another employee, referred to by Complainant Tillman as a "letout guy," was named Henry Mentel. (Apparently one of Mentel's functions was to "let out" and temporarily relieve line employees who needed to take a restroom break). Mentel was also a union steward. (Tr. at 127-30, 232, 233, 500-01). Mr. Mentel came up to Complainant Tillman, threw a side of pork at him and stated, "Hook the fucking side right, boy." (Tr. at 128). Before Mentel made this remark, there had been no prior racist statements by him or the loin pullers, but there had been such comments by other employees. (Tr. at 129-30, 370).

27. Eugene Phillips, a Black employee, also overheard Mentel and other loin pullers yell at Complainant Tillman and another Black employee who hooked sides to "hook the fucking sides,

boy" or use other racially derogatory language toward them. (Tr. at 14-15, 31, 51, 236, 274). (Loin pullers often yell at side hookers when the loin is not hooked properly as this makes their job more difficult). (Tr. at 31). Phillips heard the "hook the fucking sides, boy" language directed toward Complainant Tillman on two or three occasions, starting three or four months after Tillman was hired. (Tr. at 15, 30). He heard Henry Mentel direct racially derogatory language to Tillman on two occasions. (Tr. at 31). Phillips never heard the term "boy" used by the loin pullers toward anyone except Black employees. (Tr. at 15).

28. It is a matter of common knowledge, and certainly a matter within the specialized knowledge of this agency, that (1) the word "boy" has long been applied to adult Black males as a racial epithet; and (2) the racist implication of the use of this epithet is that Black males are incapable of acting as adults, i.e. as men, and therefore need not be addressed as men. Official notice is taken of these two enumerated facts. Fairness to the parties does not require that they be given the opportunity to contest these facts.

29. Complainant Tillman heard such name calling directed toward him on at least four days out of a typical five day work week. These incidents continued throughout the remainder of his employment. (Tr. at 130, 145, 341-42). Complainant Tillman was the recipient of racial slurs in other locations than the line. For example, another white employee named Purdy called Tillman a "nigger" in the locker room. He slammed Purdy against a locker and told him not to call him that again. (Tr. at 131, 234-36). Complainant Tillman had never experienced such treatment before in any packing plant or other employer where he worked. (Tr. at 131).

30. After Henry Mentel threw the side of pork at him and called him "boy", he turned away from the Complainant. Complainant Tillman prepared to throw it at the back of Mentel's head. Before he could complete this action, supervisor Dean Welton saw there was some kind of trouble and brought Tillman and Mentel into the cut floor office. (The evidence does not establish that Welton was aware either that Mentel had thrown the side of pork at Tillman or that Tillman was preparing to throw it back at Mentel). At that time, Complainant Tillman informed management of the racial slurs directed at him by Mentel and other coworkers. (R. EX. M; Tr. at 128-29, 370, 577-78, 604-06, 620). On the same day, after this meeting ended, Henry Mentel refused to respond to Complainant Tillman's signal to relieve him so he could take a restroom break. Tillman is certain Mentel understood the signal. This happened again on several occasions, so Tillman had to leave the line because Mentel would not respond. (Tr. at 232-33). The name calling by Mentel and other employees also continued after this meeting. (Tr. at 129).

31. David Moravec, a white employee, was a janitor at Monfort from January through May 1990. (Tr. at 64). He heard other employees refer to Tillman behind his back by racially derogatory names. (Tr. at 69). On one occasion, while Moravec observed Tillman hooking sides, he heard an employee yell "nigger." (Tr. at 70). This testimony is credited because it is consistent with other testimony. See Findings of Fact Nos. 26, 29, 32.

32. To the extent that his testimony is consistent with that of Complainant Tillman and David Moravec, Ronald Allen's testimony that Complainant Tillman was referred to by racially derogatory names such as "nigger," "black SOB," and "black F SOB" is credited. (Tr. at 287-88). It is also credited to the extent it confirms that there was at least one occasion in the locker room

where there was trouble between Complainant Tillman and another employee because of racial name calling. (Tr. at 287). See Finding of Fact No. 29. Neither Tillman's nor any other witness's testimony verifies Allen's story that there were several occasions where it was necessary to calm Tillman down and encourage the harassers to retreat in order to avoid fisticuffs in the locker room. (Tr. at 287-88). Therefore, that testimony is not credited. See Finding of Fact No. 116.

33. On May 23, 1990, Respondent Bret Goken was working on the butt line when something on that line broke. Respondent Goken signaled Complainant Tillman to shut off the main line. Tillman refused because "Charlie," apparently Charlie Freese, then general foreman, had previously "jumped us for shutting the break down" on a prior occasion. (R. EX. M, N; Tr. at 138-39). See Finding of Fact No. 20.

34 Respondent Goken responded by giving Complainant Tillman "the finger" and repeatedly yelling "nigger." at him. (Tr. at 140, 241, 500-01, 543, 552). Tillman was sufficiently angered by this action that he walked over to Goken and informed him that if he called Tillman a racially offensive name again, he would be digging his head out of a table. Goken was quiet the rest of that day. (Tr. at 141, 241-42, 558-59, 560).

35. Respondent Goken also made loud racist comments on other occasions at work when there was an audience of coworkers for him to play to. These included comments made to Complainant Tillman. Goken would take care, however, to ensure these comments were not made when they could be heard by supervisors. (Tr. at 77-78, 89).

36. On May 24, 1990, Complainant Tillman and Respondent Goken confronted each other while in line at the Monfort cafeteria. (R. EX. M, N, Tr. at 142-43, 240, 243). Goken was staring at Tillman. (Tr. at 143, 245). Complainant Tillman either told Goken, "Get the fuck out of my face" or "Who you looking at?". Respondent Goken replied either "fuck you, nigger" or "you, you fucking nigger." (Notice of Hearing; Tr. at 143, 245, 683-84). Complainant Tillman then grabbed Respondent Goken by the hair and "started slamming his head across the table" while telling him, "I'm going to take that nigger word out of your vocabulary." (Tr. at 143). It is undisputed that supervisors Dean Welton and Michael Slifer broke up this fight and escorted Tillman and Goken to Bary Carl's office.

37. Respondents Monfort admit that, "[b]ecause Monfort's 'after-the-fact-of-the-cafeteria-incident' investigation confirmed them, it is not disputed that co-worker Goken on May 23 used offensive racial epithets toward Mr. Tillman while the two were both engaged in production work, or that co-worker Goken on May 24 uttered a racial epithet towards Mr. Tillman while both were in the cafeteria." (Respondents' Monfort's Posthearing Brief at 29). Monfort's investigation also concluded that, "everything happened the way the two employees concerned said it did. Goken had antagonized Tillman to the point that Tillman reacted physically." (R. EX. M). As a result of his investigation, Monfort personnel manager Bary Carl concluded that Respondent Goken had probably racially harassed or antagonized Complainant Tillman. (Tr. at 730).

38. The union's investigation of the cafeteria incident also confirmed that Respondent Goken had used racial epithets, such as "nigger", to refer to Complainant Tillman. (Tr. at 552). The union

concluded that, but for the racial slurs and animosity directed toward Complainant Tillman by Respondent Goken, there would have been no fight in the cafeteria.(Tr. at 559). At the fourth step grievance meeting concerning Tillman's discharge, union and management were agreed that Goken had used racial slurs toward Tillman at the time of the fight. (Tr. at 682, 683-84).

39. It should be noted that there were also racist graffiti, such as "nigger," "wetback," or "KKK," as well as nonracist graffiti written on the walls and bathroom stalls in the locker room used by non-management employees. (Tr. at 17-18, 42, 95-96, 103-04, 112, 510-11, 532, 534, 565-66). There is no evidence, however, of graffiti specifically directed at Tillman or that he read, complained about, or was affected by the graffiti that was there.

40. Complainant Tillman found the acts of verbal racial harassment, and the physical act of having the side of pork thrown at him while being referred to as "boy," to be offensive acts which angered and upset him. (Tr. at 127-28, 131-32, 141, 145, 171). The work environment made him feel "like dirt." (Tr. at 132). Complainant Tillman's reaction to this harassment makes it clear it was unwelcome. See Findings of Fact Nos. 29-30, 34, 36. Any reasonable person would also find such unwelcome verbal and physical conduct to be hostile and abusive.

C. The Harassment of Complainant Tillman Was Based on His Race:

41. The offensive verbal conduct directed at Complainant Tillman by Respondent Bret Goken and other coworkers was clearly based upon his race. The use of such racially derogatory language as "boy", "nigger," and "coon" towards Tillman is obvious race based harassment. In addition, the act of throwing a side of pork at Tillman while referring to him as "boy" is race based harassment. See Findings of Fact Nos. 26, 30.

D. The Harassment Affected A Term, Condition, Or Privilege of Complainant Tillman's Employment:

42. The preponderance of the evidence demonstrates that the harassment adversely affected Complainant Tillman's working environment, which is a condition of his employment. See Conclusion of Law No. 42. The totality of circumstances shown in the evidence, including the frequency of the conduct, its severity, its humiliating nature, and its impact on Complainant's work performance demonstrate the hostile and abusive nature of his working environment. See Findings of Fact Nos. 43-46.

1. Frequency of the Harassment:

43. Complainant Tillman's working environment could and was reasonably perceived to be a hostile or abusive environment due to the pervasive racial harassment endured by Complainant Tillman. As previously noted, the verbal harassment was directed toward Tillman on at least four days out of a typical five day work week. This harassment occurred both on the line and in the locker room. See Finding of Fact No. 29. At times, the harassment by coworkers would include repetitious use of racist language, such as the use of the word "nigger" by Respondent Bret Goken toward the Complainant. See Finding of Fact No. 34. These epithets were frequent and

not sporadic comments. Thus the frequency of these acts supports the conclusion that they resulted in a hostile or abusive working environment. See Findings of Fact Nos. 26-38, 40.

2. Severity and Physically Threatening or Humiliating Nature of the Harassment:

44. The racially derogatory language directed toward Complainant Tillman by Respondent Bret Goken and others was neither accidental nor part of casual conversation. The regular, frequent, and repetitive use of such words as "nigger," "coon," and "boy" toward a Black employee by coworkers is a sufficiently severe and humiliating activity to create a racially hostile or abusive working environment for that employee. See Findings of Fact Nos. 26-38, 40. When an object, such as a side of pork, is thrown at a Black employee by a coworker while calling him "boy," the act of throwing the object may also be seen as physically threatening. See Findings of Fact Nos. 26, 30, 41. The combination of repeated verbal harassment by coworkers and a one time incident of physical harassment by a coworker is sufficiently severe to show an abusive and physically threatening or humiliating work environment.

3. Interference With Work Performance Caused By the Harassment:

45. There was some interference with Complainant's work performance caused by the harassment. For example, when Henry Mentel referred to Complainant as "boy." while telling him to hook the side correctly, Mentel nearly precipitated a fight. See Findings of Fact No. 30. This type of interaction between coworkers interferes with job performance. The same could be said for Bret Goken's reference to the Complainant as "nigger" when he failed to shut down the line. See Findings of Fact No. 34. On that occasion, Complainant Tillman left his job function of trimming hams while he went to tell Goken to stop that language. Since the line continued to function while he was gone, he told a coworker to let the hams continue down the line untrimmed while he talked to Goken. (Tr. at 142). Complainant's work performance was also made more difficult because he had to walk off the line because Mentel refused to relieve him when he took a break. See Finding of Fact No. 30. Of course, being angered or made to feel "like dirt" on the job can also make a job more difficult. The Complainant not only became angry enough to threaten Goken, but also angry enough to slam Goken's head into the table when Goken again referred to him as "nigger." See Findings of Fact Nos. 34, 36, 40. The reference to himself as a "boy" also led Complainant Tillman to distrust the union to such a degree that he tried to leave the union and refused having a steward present when warned about an unexcused absence. (R. EX. BP; Tr. at 259-261). The interference with job performance here was severe enough to support the conclusion that the harassment created an abusive or hostile working environment.

46. Given the frequency of the acts of racial harassment, their severity, their humiliating nature, their interference with job performance and the physically threatening nature of one of these acts, these acts affected a condition of Tillman's employment by creating a racially hostile and abusive working environment for him.

E. The Commission Has Established That Respondent Bret Goken Engaged In Racial Harassment of Complainant Tillman:

46A. From the above facts, it is clear that the Commission has established all the elements necessary to show that Respondent Bret Goken engaged in racial harassment of Complainant Tillman. These elements include:

a. that Complainant Tillman is Black and is therefore a member of a class protected against race discrimination; See Finding of Fact No. 24.

b. that he was subjected to harassment by Respondent Goken and other employees of Respondents Monfort of Colorado, Inc. and Con Agra. This was adverse conduct which he regarded as uninvited and offensive and which any reasonable person would regard as offensive; See Findings of Fact Nos. 25-40.

c. that this harassment was based upon his race, i.e. because he is Black; See Finding of Fact No. 41.

d. that this harassment created a hostile or abusive work environment. See Findings of Fact Nos. 42-46.

F. With the Exception of That Harassment Which Complainant Tillman Initially Informed Them About With Respect to Acts Committed By Henry Mentel and Other Coworkers, Respondents Monfort Did Not Know Nor Should They Have Known of Racial Harassment Directed Toward Complainant Tillman Until After the Cafeteria Incident With Respondent Bret Goken.

1. With the Exception of the Harassment Initially Committed By Henry Mentel and Other Coworkers, Respondents Monfort Did Not Know of Racial Harassment Directed Toward Complainant Tillman Until After the Cafeteria Incident With Respondent Bret Goken:

47. As previously noted, Complainant Tillman informed Monfort management of the racial slurs initially directed at him by Henry Mentel and other coworkers. See Finding of Fact No. 30. That fact is confirmed not only by Tillman's testimony, but also by the testimony of supervisor Dean Welton; general foreman Charlie Freese; union steward Jerry Rutherford, and by the notes and testimony of personnel manager Bary Carl. (R. EX. M; Tr. at 128-29, 370, 541-42, 577-78, 606, 620,725-26).

48. There is no evidence to support the proposition that Respondent's Monfort's management was aware of the continuing harassment of Complainant Tillman by Henry Mentel and other coworkers after Tillman complained to Respondents Monfort's management about them. There is also no evidence to support the proposition that Respondent's Monfort's management was aware of any other racial harassment of Complainant Tillman until the cafeteria incident on May 24, 1990. The preponderance of the evidence suggests that Monfort's management was not aware of any such harassment of Tillman. (R. EX. M; N; Tr. at 77-78, 89, 90, 141, 233, 235, 242-43, 258, 289, 318, 373, 390, 493, 495, 520, 521, 532, 577-78, 604-05, 610, 639, 724, 725-26). No supervisors were around when Respondent Goken used racist epithets toward Tillman. Complainant Tillman did not inform management of that conduct, or of other harassment after the initial harassment by Mentel and the loin pullers, until after the fight in the cafeteria. (R. EX. M; Tr. at 77-78, 89, 233-35, 242-43, 373, 390, 493, 495, 513-14, 520, 521, 610, 639, 724, 725-

27). Even when a supervisor came over to Respondent Goken to fix the problem that led to Goken yelling at Tillman, Complainant Tillman did not report Goken's conduct to that supervisor. (Tr. at 243).

2. Respondents Monfort Were Not In A Position Where They Should Have Known of Continuing Racial Harassment of Complainant Tillman During the Period From the Time He Reported the Harassment by Mentel and Other Coworkers to the Time of the Cafeteria Incident:

49. The preponderance of the evidence does not support the position that Respondents Monfort should have known of the continuing racial harassment of Complainant Tillman during the period after he reported the harassment by Henry Mentel and other coworkers and before the cafeteria incident. There are five reasons why this is so.

50. First, the cut floor at the Monfort Pork Plant is a noisy working environment. Production workers are required to wear ear plugs in or ear muffs over both ears to protect them from the noise. Supervisors wear an ear plug in the left ear and a radio ear plug and an ear muff in the right ear. Under these conditions, supervisors and employees must shout to make themselves heard up to 20 feet away. (CP. EX. 7; Tr. at 38, 50, 51, 57, 120, 483-86). Thus, things may be said, or even shouted, which are not necessarily overheard by a supervisor.

51. Second, at Monfort only supervisors wear blue hard hats so that they may be immediately recognized if an employee wishes to talk to one. (Production workers wear white hats; leadmen, red or orange hats; and union stewards, green hats). These blue hats, however, also make it easy for those who wish to engage in misconduct to do so only while they are not being observed by a supervisor. (CP. EX. 7; Tr. at 9-10, 77-78, 87-89, 295-96, 473-74, 483, 526, 629, 638, 651). This is possible because the supervisors are mobile and move throughout their area of supervision unless they are dealing with some particular problem such as briefly taking over an employee's function due to the employee's absence until the spell-out employee arrived to take it over. (Tr. at 35-36, 50, 479, 599, 802). Perhaps 40 minutes a day would also be spent in the supervisors office on the cut floor. (Tr. at 482). Complainant Tillman noted that he hardly ever even saw his supervisor. (Tr. at 261). Caroline Tillman saw hers two to three times a day. (Tr. at 399). Eugene Phillips noted that it might take a minute or so to get the attention of his supervisors because they were mobile. (Tr. at 50, 57-58). Under these circumstances, employees are even able to and do conceal fights from management when the fights occur at times when no supervisor is present in the immediate area. (Tr. at 94, 106, 502-06, 529, 583-84).

52. Third, the preponderance of the evidence does not demonstrate that acts of racial harassment of Blacks at the Monfort Pork Plant were so numerous that a reasonably observant supervisor, under the conditions described above, could not have failed to notice them. There is, in addition to the evidence of harassment of Complainant Tillman previously cited, credible evidence of only sporadic incidents of racial harassment. Although the incidents of harassment met the combined standards of pervasiveness and severity enough to prove a racially hostile environment for Complainant Tillman, it does not necessarily follow that they were pervasive enough to have provided constructive notice to Monfort. See Conclusion of Law No. 57.

53. This evidence includes the comments of Eugene Phillips and Caroline Tillman which indicate that they were treated far better than Complainant Tillman with respect to incidents of racial harassment. (Tr. at 52, 459, 464). Tracey Harrington, a Black employee whose deposition was entered into evidence, testified that she worked at Monfort for almost a year starting in August of 1989. During that time, she never heard racially derogatory remarks being made to her or to anyone else. (CP. EX. 7).

54. Thus, no one made racially derogatory comments toward Eugene Phillips during his four and one half years at Monfort, although he did hear certain racial comments directed towards Complainant Tillman and one other Black employee. He did not hear any comments toward Tillman until after Tillman had been employed three or four months. See Finding of Fact No. 27. (Phillips testified on different occasions both (a) that racially derogatory statements were not directed toward him and (b) that supervisor Dean Welton referred to him when making the statement to Moravec that "He'll learn quick, he's a good boy," which Phillips felt was a racially derogatory statement. Since (a) Welton denies ever having used the word "boy" to refer to African-American men, (b) Phillips had previously testified on deposition that no one ever made racially derogatory comments to him, (c) Phillips was a friend of the Tillmans and (d) Phillips had animosity toward Monfort due to the firing of Complainant Tillman, the only testimony which is credited on this issue is that wherein Phillips denies having been called such names). (Tr. at 16, 30, 40, 616). Phillips did not complain to either the union or management about any racial comments he may have heard. (Tr. at 16, 39-40)

55. Caroline Tillman was the complainant's sister. She worked at Monfort from August of 1989 until December of 1993. She testified that she would have continued to work at Monfort if she still had a reliable ride to work. (Tr. at 114, 393-94, 429-30, 459). The picnic line was her first assignment. After approximately six weeks there, she transferred to the giblet meat position. (Tr. at 396-97). She did not find her work environment to be racially hostile for the over four year period after the transfer. She worked by herself and basically only saw other people at break and lunch. (Tr. at 430, 459, 462-63).

57. She claimed that, during the six weeks she was on picnic line she repeatedly heard racial or ethnic slurs on the plant floor. However, with the exception of one incident, she could not identify any of the specifics of the alleged name calling, such as the names used, who said them, what their position was, or any other details whatsoever. (Tr. at 405, 407, 459). Since the victims of verbal racial harassment are usually able to identify with some detail more than one incident of harassment, it appears that particular testimony may be exaggerated to aid her brother.

58. Her testimony is credible to the extent it indicates that there was an incident where either a Jeff Davis (also referred to in the record as "Davison") or an individual named "Kent" called her a "Black bitch" or "nigger bitch" on one occasion. She seems to be confused as to who made this remark. During deposition, she testified that the only time she was ever called a racially derogatory name at Monfort was by a man named Kent. (Tr. at 441-42). At hearing, she testified "I have had some [comments] directed to me, but I can't tell you exactly what they said to me. Oh God, Jeff Davison called me--what did he call me? I don't know. It was black B or nigger B." (Tr. at 405). She testified that she did not report that incident to management, but did bring it to the attention of Complainant Tillman, Eugene Phillips and Vern Freese, a union steward. She

testified that, after her brother, Phillips, and Freese talked to him, Davis ceased to bother her and became her friend. (Tr. at 405-07).

59. Caroline Tillman may have been confused because she had previously been called "scab" by Jeff Davis and had blood clots thrown on her clothes by him. She reported these incidents to Mike Slifer. She met individually with both Slifer and union steward Jeannie Tasler. They then met with Davis, but his behavior did not change. She again complained and general foreman Charlie Freese had her moved to the giblet position. While she understood that the "scab" epithet is normally applied to those who cross picket lines, she believed that it was applied to her because of her race as she had not crossed any picket lines. (Tr. at 401-05, 437-38, 440-41, 461-62). For reasons stated in the conclusions of law, the use of "code words," which are not explicitly racial, toward minority employees may be racially motivated. See Conclusion of Law No. 58. Nonetheless, there is no evidence in the record that she told Monfort management that she believed either of these acts were racially motivated. (Tr. at 489). Nor is there evidence that "scab" was used at the Monfort plant as a code word which was intended to racially demean Blacks or that throwing blood clots is used as a form of racial harassment against Blacks.

60. It appears more likely, in accordance with her deposition testimony, that Caroline Tillman was called "nigger bitch" on one occasion by Kent Goldsberry. That incident was reported to the union steward Vern Freese. Management. learned of it from either Caroline Tillman or from Vern Freese. (Tr. at 441-42, 608).

61. Racial graffiti would appear in the production workers locker room along with graffiti on a variety of other topics. See Finding of Fact No. 39. Some of the racial graffiti were seen by supervisor Michael Slifer. (Tr. at 510-11). Some of it was also reported to supervisor Verne Cosselman. (Tr. at 533). On its posthearing brief, Respondents Monfort admit that there were from time to time, graffiti in the production workers restrooms. (Respondents Monfort's Posthearing Brief at 4).

62. Another incident of harassment was alleged to have occurred after the altercation between Respondent Goken and Complainant Tillman was broken up by supervisors Dean Welton and Mike Slifer. Both Tillman and Goken were then taken to the office of personnel manager Bary Carl. Present at the office were Complainant Tillman, Respondent Goken, Bary Carl, Dean Welton, Mike Slifer and Jerry Rutherford, union steward. (R. EX. M, N; Tr. at 144-45, 415, 498-99, 525, 539, 542). Caroline Tillman was also present for 10-12 minutes. (Tr. at 417).

63. Complainant Tillman and his sister, Caroline Tillman, testified that, in the personnel (Bary Carl's) office, Respondent Goken began repeatedly calling him "nigger" and other racially derogatory language. (Tr. at 144-45; 247-249, 343, 345, 415, 417, 447). Complainant Tillman asserted that this included Goken yelling "that fucking nigger did this, that fucking nigger did that." in response to Bary Carl asking what happened. (Tr. at 145). Caroline Tillman, however, testified that Bret was not answering any questions asked by Bary Carl because no one asked any questions. (Tr. at 416).

64. Both of the Tillmans testified that Goken was permitted to use this language without any attempt being made by any member of management to control it. (Tr. at 249, 345, 416, 420-21,

447-49). Complainant Tillman also testified in deposition, however, that he was not thinking too straight at this meeting. (Tr. at 373-74). Personnel manager Bary Carl denied that Goken used racial slurs in his office and would have stopped it if he had. (Tr. at 727-28). Supervisor Mike Slifer never heard Goken utter any racial slur to Complainant Tillman or any other employee. With respect to the meeting after the cafeteria fight, he does not remember any racial slurs being stated by Goken on that occasion. (Tr. at 514, 520). Supervisor Dean Welton denied that Goken used racial slurs in this meeting. (Tr. at 614). Union steward Jerry Rutherford cannot recall Goken ever using such language during this meeting. (Tr. at 541, 556,) Failure to stop the use of racial epithets by Goken would be inconsistent with Respondents Monfort's policy, and, of far greater importance, its past practice, of prohibiting racial harassment, including but not limited to the use of racial slurs. See Findings of Fact Nos. 22A, 22B, 67A-79, 84. It is more likely than not that Respondent's management would have stopped Goken. Therefore, the Tillmans's testimony on this issue is not credited.

65. On direct examination, Complainant Tillman also testified that, at this meeting in Bary Carl's office, Bary Carl stated "I don't know why the word "boy" offends you people." Tillman further testified he did not respond to this statement, but just shook his head and walked out. (Tr. at 145-46). On deposition, Complainant Tillman had previously given a different story. He stated that after Bary Carl made this statement, he did respond to it by explaining the word "boy" offended him "because I ain't a boy, I am a grown man." (Tr. at 344-45). Bary Carl denies making this statement. (Tr. at 727). If this statement had been made by Carl, it might have been asked in order to elicit information on why the word "boy" was offensive to Blacks and not as a racially derogatory statement. Given Carl's denial and the past practice and policies implemented by Respondents Monfort with respect to racial harassment, it is more likely than not that the statement was not made or was not intended as a racially derogatory statement if made.

66. Fourth, Respondents Monfort failure to learn of racial harassment did not come about because they failed to communicate their anti-harassment policy and methods for grieving acts of harassment to the employees. New employees are informed at orientation that, if they have a problem with another employee, they should bring it to the attention of a supervisor or union steward. (CP. EX. 7; R. EX. AB; Tr. at 32-33, 62-63, 83, 395, 436, 799). Complainant Tillman was told this. (Tr. at 119-20, 229). They are also provided with an employee handbook which indicates that racial harassment is prohibited. (R. EX. AB; Tr. at 27-28, 395, 709). See Finding of Fact No. 22A. Race discrimination is specifically prohibited by the bargaining agreement. Employees can grieve race discrimination under the bargaining agreement. (JOINT EX. 1). Federal anti-discrimination law and Monfort's anti-harassment policy are also posted in the plant. (R. EX. AB; Tr. at 43-44, 475, 713-15, 771-72).

67. Fifth, it has already been noted that, with the exception of complaining about the remarks made by Henry Mentel and other coworkers after being called to the office because he was about to strike Mentel with a side of pork, Tillman made no complaints about harassment prior to the cafeteria incident. See Finding of Fact No. 30, 48. The evidence demonstrates that there were few other complaints made to Monfort management about racial harassment at the Monfort Pork Plant. See Findings of Fact Nos. 54, 58-60.

G. The Commission Has Not Proven That Respondents Monfort Failed to Take Prompt and Appropriate Remedial Action With Respect to Those Incidents of Harassment of Complainant Tillman Which It Knew About:

67A. The Commission has failed to prove that Respondents Monfort failed to take prompt and appropriate remedial action with respect to those incidents of harassment of Complainant Tillman about which it knew.

1. The Evidence In the Record Does Not Establish That Respondents Monfort Failed to Take Prompt and Appropriate Corrective Action When They Were Informed of the Harassment of Complainant Tillman By Henry Mentel and Others:

68. The first and only incidents of harassment of Complainant Tillman of which Respondents Monfort were aware prior to the cafeteria incident were those that Complainant Tillman had informed them of, i.e. the name-calling by Mentel and other loin pullers, whose identity is not reflected in the record. See Finding of Fact No. 30, 48, 67.

69. On that occasion, general foreman Charlie Freese, supervisors Dean Welton and Byron Coleman met with union steward Vern Freese, Complainant Tillman and Henry Mentel. (Tr. at 128, 542, 577, 605-06). It is not clear in the record whether or not general foreman Charlie Freese was also present. Complainant Tillman indicated he was. Freese's testimony indicates, however, only that the meeting was reported to him. (Tr. at 128, 577-78, 587). Byron Coleman does not remember the meeting, although he does recall that there was an incident involving Tillman and Mentel. (Tr. at 637-38).

70. At that meeting, Byron Coleman informed Tillman and Mentel that he would keep an eye out for name calling. He indicated that, if he caught anyone calling Tillman a name, he was going to issue discipline up to and including discharge. After hearing both sides of the story, Dean Welton also stated that type of behavior would not be tolerated and it was not to happen anymore. Mentel was also specifically told by union steward Vern Freese that name calling was not going to be tolerated. (Tr. at 129, 179, 606, 638). Given the gravity of the harm done by such name calling, the nature of the harassment (i.e. that, as far as the employer knew, it was limited to name calling), and the information available to the employer, this was prompt and appropriate remedial action.

71. Complainant Tillman was then asked to leave the meeting by the union steward, Vern Freese, so he and the managers could talk alone with Henry Mentel. (Tr. at 129). The record does not reflect what else was said to Mentel after Tillman left.

72. In his testimony, Complainant Tillman emphasized that he saw Henry Mentel walk out of the meeting "smiling." (Tr. at 131, 233, 392). Tillman also testified, however, that Mentel might have been smiling just to annoy him. (Tr. at 233-34). It would be pure speculation to assume that the fact, that Mentel left the office "smiling," meant that the supervisors and union steward had reversed their position after Tillman left and indicated they approved of his actions. There are any number of explanations which might account for Mentel smiling after he left the office,

including the possibility that he was just not intelligent enough to realize the seriousness of the situation.

2. The Credible Evidence Indicates That the Policy and Practice of Respondents Monfort Was to Take Prompt and Appropriate Remedial Action To Halt Harassment When They Knew of It.

73. The suggestion that Monfort management would either express approval or renounce their prior disapproval of Mentel's harassment of Complainant Tillman is contradicted by both their policy against racial harassment and their past practices with respect to racial harassment. See Finding of Fact No. 22A. These past practices include investigating harassment complaints, warning harassers, and suspending or discharging those who are known to continue to harass. (Tr. at 85-86, 98-100, 129, 288-89, 495-96, 501, 609-610, 689-90, 715-19, 799-800).

74. At times, these practices also include requiring the harasser to apologize or withdraw his statement to the victim or having the parties agree to a resolution of the situation. (Tr. at 288, 439, 608-10, 619-20, 717-18). This is not to suggest that such apologies or voluntary resolutions would be sufficient without at least an oral warning of further discipline for future harassment. See Conclusion of Law No.65. There is also evidence to suggest that formal disciplinary action such as written warnings or harsher discipline would not be implemented on the first instance of verbal harassment. (Tr. at 619-21, 623-24). The greater weight of the evidence, however, shows that the usual practice was to give harassers oral warnings of future discipline in the event of further acts of harassment. (Tr. at 85-86, 129, 288, 609, 689, 799-800).

75. For example, when supervisor Dean Welton was informed that Caroline Tillman was called "nigger bitch" by Kent Goldsberry, he held a meeting with Caroline Tillman, Kent Goldsberry and union steward Vern Freese. (Tr. at 438-440, 608). See Finding of Fact No. 60. At that time Goldsberry was specifically warned by Welton that racial harassment was not tolerated and he was to end it or he would be disciplined further. (Tr. at 608-09). Ms. Tillman acknowledged that Goldsberry apologized and "then we became friends." (Tr. at 439). There were no more such problems with Mr. Goldsberry. (Tr. at 439-440, 605).

76. David Moravec was also warned after a sexual harassment complaint was made against him for calling a woman a "f'ing scab" for taking his job during a previous strike. She complained directly to Bary Carl. This resulted in a meeting involving him, the female who complained, Bary Carl, and a third person, Rick Blackford. While the exact warning given Moravec is not in the record, he described the meeting as a "humdinger" which persuaded him to keep his mouth shut. (Tr. at 98-100).

77. In another instance, a Black man was not willing to apologize to a Black woman whom he called a racial name. He was not willing to recant and he was terminated. (Tr. at 718).

78. In another instance, John Geisinger, a white male, was involved in two separate situations. (Tr. at 718, 774-75). In the first one, an Hispanic employee pushed Geisinger off a step. This incident was a racially motivated altercation and recorded as such in Geisinger's personnel file. (Tr. at 676-77, 776-77). Both Geisinger and the Hispanic employee were given reprimands. (Tr.

at 718-19). Pushing and shoving, were, at that time, viewed as horseplay and not fighting. (R. EX. AB; Tr. at 775-76).

79. In the second situation, Geisinger got into an argument with Tommy Mitchell, a Black employee, where Geisinger used racial slurs. (Tr. at 719, 775). This led to a lot of pushing and shoving by both Geisinger and Mitchell. Apparently each had taken a swing at the other and connected. (Tr. at 775). According to his personnel file, Geisinger was discharged for fighting. on company property. (Tr. at 776). Mitchell, however, was given a warning for horseplay. (Tr. at 775-76). Geisinger received harsher discipline because his disciplinary record showed that he had previously had been subjected to discipline for the racially motivated incident concerning the Hispanic employee. (Tr. at 776-77).

80. A flaw in Respondents Monfort's disciplinary system, as it existed at the time, was the failure to record in the harasser's personnel file instances where verbal warnings against harassment were given by supervisors after meetings in the cut floor office or other locations where Bary Carl was not present. Mr. Carl would then have no record showing that a repeat offender had previously engaged in harassment. (Tr. at 776-77). There is a risk that an employee could have repeatedly engaged in acts of harassment while receiving no discipline beyond repeated verbal warnings. Such repeated warnings would not be sufficient to deter future acts of harassment. See Conclusion of Law No. 61. There is no evidence, however, which indicates that this affected the situation with Complainant Tillman. Nor does this flaw demonstrate that Respondents Monfort actually failed to take appropriate action when they were aware of harassment.

81. Another flaw in the methods used by Respondents Monfort to correct racial harassment was its somewhat slow response in removing racist graffiti. Such graffiti would appear despite its posted policy against any graffiti. (Tr. at 314, 486-87). See Findings of Fact Nos. 39, 61. See Conclusion of Law No. 66. The greater weight of the credible evidence indicates the response was not as infrequent or slow as suggested by the testimony of Eugene Phillips. He indicated racist graffiti would remain indefinitely and was painted over or cleaned off only 2-3 times during his over four years of employment. (Tr. at 6-7,18). It is more likely that such graffiti would remain for 1-3 weeks before being removed. (Tr. at 96-97, 566). Nonetheless, as previously noted, there is no evidence that this graffiti affected Complainant Tillman. See Finding of Fact No. 39.

82. A possible third flaw in Respondents Monfort's response to racial harassment was its failure, after warning the harassing employee, to check back with the complaining employee to see if he was undergoing any further harassment. It is clear from the record that Respondents Monfort would only rely on the complaining employee or others to report any future harassment. See Findings of Fact Nos. 30, 48, 66-67. There is no evidence in the record to indicate, however, that Tillman would have informed Respondents Monfort of the further harassment if they had asked him about whether such harassment was occurring. For this reason and for reasons stated in the conclusion of law, this flaw is not sufficient to show Respondents Monfort failed to take prompt and appropriate remedial action. See Conclusions of Law Nos. 67.

3. The Evidence In the Record Does Not Establish That Respondents Monfort Failed to Take Prompt and Appropriate Corrective Action When They Were Informed of the Harassment of Complainant Tillman by Bret Goken:

83. As previously noted, personnel manager Bary Carl came to the conclusion that Respondent Bret Goken had provoked the fight through racial harassment. See Finding of Fact No. 37. Respondent Goken was then discharged for provoking the fight. (CP. EX. 8; D. EX. N; Tr. at 730).

84. After his discharge was grieved, Goken was reinstated at the fourth step of the grievance process. Nonetheless, he was still disciplined by being denied back pay for the two and one half week period from his discharge on May 25, 1990 to his reinstatement on June 13, 1990. Thus, although Goken was reinstated, he still sustained what was, in effect, a two and one-half week suspension for fighting. (CP. EX. 8; Tr. at 685, 744, 746). Although "fighting" is listed on his personnel record as being the reason he was dropped from payroll on May 25, 1990, it is clear that his only misconduct in the fight was his act of provoking it by again referring to Complainant Tillman as a 'nigger." See Findings of Fact No. 37, 83. Thus, separate discipline for racial harassment would have duplicated the discipline for "fighting". The two and one half week suspension without pay was prompt and appropriate corrective action for Goken's harassment of Tillman.

IV. DISCHARGE:

A. The Commission Established A Prima Facie Case of Discriminatory Discharge:

1. The Complainant Is A Member of a Protected Class:

85. As previously noted, Complainant Tillman, a Black male, is a member of a protected class. See Finding of Fact No. 24.

2. The Complainant Was Qualified For the Job From Which He Was Discharged:

86. Complainant Tillman performed his job as a production worker at Monfort for approximately eight months. He had previously been employed for five years in another packing facility. See Finding of Fact No. 18. The evidence in the record indicates that management at Monfort considered Tillman's work performance to be good. (Tr. at 522, 580). Clearly, Complainant Tillman was qualified for the production worker position from which he was discharged. See Finding of Fact No. 18.

3. Complainant Tillman Was Discharged From His Job As A Production Worker:

87. As previously noted, Complainant Tillman was discharged from his job as a production worker. See Finding of Fact No. 18. It should also be noted that, based on what is known of their total experience in the meat packing industry as of May 25, 1990, it appears that Complainant Tillman was equally or better qualified for the production worker job than Bret Goken, who was ultimately retained. See Findings of Fact Nos. 18, 23. Through the establishment of these three

facts, the Commission has established a prima facie case of discriminatory discharge. See Findings of Fact Nos. 85-87. See Conclusions of Law Nos. 75-76.

B. Respondents Monfort Articulated, Through The Production of Evidence, a Legitimate, Non-Discriminatory Reason for Complainant Tillman's Discharge:

88. Respondents Monfort articulated a legitimate, non-discriminatory reason for Complainant Tillman's discharge. That reason is that he violated the company's policy against fighting. Specifically, Tillman was fired because he was the physical aggressor in the fight between him and Goken. (R. EX. AB; M Joint EX. # 2; CP EX. # 2; Tr. at 588-89, 648-49, 657, 670, 684, 730, 736).

C. The Commission Failed to Show That Respondent's Reason for the Discharge of Complainant Tillman Was A Pretext for Discrimination:

1. The Commission Failed to Show That The Proffered Reason For Complainant's Discharge Either Had No Basis In Fact or That It Did Not Actually Motivate The Respondent's Decision to Discharge Complainant Tillman:

89. The Commission does not even argue, on brief, that the reason given for Complainant's discharge either had no basis in fact or that it did not actually motivate Respondents Monfort's decision to discharge. (Commission's Post Hearing Brief). The overwhelming weight of the evidence shows that Complainant Tillman was discharged because he was the physical aggressor in his fight with Goken. (R. EX. M, CP EX. # 2; Tr. at 452-53, 657, 684, 730, 736). It is undisputed that the only physical aspects of this fight were Complainant Tillman grabbing Goken's head and repeatedly slamming it into a table. See Finding of Fact No. 36. There is no evidence that the employer provided inconsistent reasons for its discharge of Complainant Tillman.

90. After the fight with Goken, both Goken and Complainant Tillman were suspended pending investigation. (R. EX. M, N; Tr. at 238, 451, 784). The employer conducted a thorough investigation of the incidents leading to the fight in the cafeteria. (R. EX. M, N; Tr. at 722-23, 725-30, 737-39). After the investigation, both Goken and Tillman were discharged. (Tr. at 730, 784) (Based on grievance and personnel file documents, Tillman's and Goken's discharges were made effective the day of the fight and the beginning of the suspension, May 25, 1990.) (CP. EX 2, 8). The decision was made by personnel manager Bary Carl in consultation with plant manager Lincoln Woods and the corporate office. (Tr. at 737, 745). Both Goken and Tillman grieved their respective discharges. (CP. EX. 2, 8). Goken was reinstated at the fourth step of the grievance procedure, while Tillman was not, solely because Robert DeRaad, Monfort's corporate labor relations representative, who handled arbitrations, believed that Goken's grievance would be lost by the company if taken to arbitration. DeRaad felt the punishment did not fit the offense, as Goken had received no prior warning on harassment. (Tr. at 658, 740, 745-46). DeRaad had the authority to overrule and did overrule Bary Carl and Lincoln Woods, both of whom wanted Goken to remain discharged, during the grievance process. (Tr. at 740, 744-45). The decision to not reinstate Complainant Tillman was apparently based on the belief that Monfort would prevail in arbitration of that grievance because Tillman had violated the company policy on fighting by

being the physical aggressor in the fight. (Tr. at 149, 736). Such an outcome would have been consistent with Monfort's policy and past practice. (R. EX. O, P, S, V, W, X, Y, Z, AA, AB; Joint EX # 2; Tr. at 43, 49, 58-59, 97, 107, 149, 434, 588-89, 615, 648-49, 652-53, 670, 690-91, 696-98, 748-55, 791-94). See Findings of Fact Nos. 22B, 89.

2. The Commission Failed to Show That The Reason For Complainant Tillman's Discharge Proffered by Respondent's Monfort Was Insufficient to Motivate the Discharge:

a. The Commission failed to show that the reason given by Monfort was too remote in time to justify the discharge:

91. On brief, the Commission did not argue either that the reason offered by Monfort involved an event too remote in time from the discharge to justify the action taken. (Commission's Posthearing Brief). Such a conclusion would be contrary to the evidence as Complainant Tillman was discharged soon after the investigation of the fight was completed. (Tr. at 730).

b. The Commission failed to prove that Respondent Monfort had a practice of retaining white employees it knew to have been physical aggressors in fights on company property while discharging similarly situated Black employees.

92. On brief, the Commission suggests that "white employees involved in widely-observed fights that resulted in injuries kept their employment, while he [Tillman] was discharged." (Commission's Post-Hearing Brief at 17).

93. It has already been noted that it was Respondents Monfort's policy and practice to discharge only the known physical aggressors in fights. See Finding of Fact Nos. 22B, 90. Thus, the appropriate comparison would be between the treatment by the company of white and Black employees known by Monfort to be physical aggressors in fights.

94. It has already been noted that co-workers are able to conceal fights from management when the fights occur at times and places where no supervisor is present. See Finding of Fact No. 51. Some employees, such as former steward Ron Allen, felt it was wrong for a union member to report conflicts between one union member and another employee to management. Such action, it was believed, could result in a fine by the union against the union member making the report. (Tr. at 278, 289-90, 295-97, 316-17, 680-81). Thus, co-workers may witness a fight which results in no discipline. For example, when supervisor Michael Slifer received a report of an altercation between Chris Spidell and a McDowell involving an exchange of blows, he took them to personnel. Both said nothing happened. Neither were bruised nor bloody. Three employees, who did not seem to be credible to Mr. Slifer, denied that they saw anything. Under these circumstances it would make no sense to discipline the accused employees, as they could probably successfully grieve the discipline. (Tr. at 504-06). On the other hand, the fight between Goken and Complainant Tillman was not concealed because supervisors Welton and Slifer witnessed it and broke it up. (Tr. at 144, 410, 493-96, 610-11).

95. When a disturbance is reported to management, and the personnel involved are called to Bary Carl's office, the union stewards are usually present in accordance with the bargaining agreement. If there is no evidence of physical injury, and/or if no supervisors were present

during the actual fight, the union stewards, and the employees involved in the altercation, would argue, with some success, that the fight did not involve physical blows, but only pushing or shoving. This tactic, if successful, would bring the altercation within the parameters of the "horseplay" rules and out of the "fighting" rules involving a physical altercation. It is strongly implied in the testimony that this tactic would be followed even if there actually was an exchange of blows. This was done so that neither employee would be discharged for fighting. If this were a first offense for both employees, they would receive lesser discipline for horseplay. (Joint EX. 1; R. EX. BP; Tr. at 550-51, 585, 590-91, 670-72, 711, 760, 776). See Findings of Fact Nos. 22A and 22B.

96. The use of this tactic could explain some of the reports where both employees involved in fighting were returned to work. For example, Caroline Tillman saw general foreman Charlie Freese and supervisor Mike Slifer take two white males out of the men's locker room after some sort of altercation. Of course, Ms. Tillman was not in the men's locker room and could not have seen the altercation. The men were both returned to work. There is no evidence as to whether this was a purely verbal altercation, a matter of pushing or shoving (horseplay), a physical fight, or a physical fight which was reported to management as a matter of pushing and shoving. (Tr. at 423-24). Thus, this incident is not sufficient to show a difference in treatment between similarly situated Black and white employees.

97. Both Complainant Tillman and Tracey Harrington observed a fight which is suggested as an instance of different treatment on the basis of race by the Commission. (Commission's Posthearing Brief at 17; CP. EX. # 7; Tr. at 150-53). Two white males, Jeff Davis and Mark Mitchell, engaged in a physical fight on the picnic line. (CP. EX. # 7; Tr. at 150-51). At first, there was pushing and shoving. (CP. EX. # 7). The shorter one then hit the taller one (Davis) in the face with a bone, causing a cut. (CP. EX. # 7; Tr. at 151-52). No supervisors were present at the time of the fight, which was broken up by coworkers. Supervisor Slifer appeared approximately four minutes after the fight. (CP. EX. # 7; Tr. at 152). The two employees were taken to the cut floor office. (Tr. at 153, 266). They returned to work after being suspended for a period of time. (CP. EX. # 7; Tr. at 153). Complainant Tillman did not report what he saw of this fight to management. (Tr. at 265). There is also no evidence that Harrington reported what she saw to Monfort management. (CP. EX. 7).

98. Under this evidence, it is not known what information Respondents Monfort had with respect to this fight. It is also unknown what conclusions, if any, Monfort was able to reach with respect to which employee was an aggressor. It is also not known whether Monfort was told the facial injury resulted from an accident or pushing or shoving. This one incident is not sufficient to show race discrimination, especially in light of the discharges of other white employees for fighting. See Finding of Fact No. 102.

99. In was also averred that a white employee was retained, despite being the physical aggressor in a fight, when there was an altercation between Ron Allen and Glen Sharp. Ron Allen testified that, approximately one month before the hearing, he hit Glen Sharp in the head with a loin after Sharp called him names. Allen testified that he only received a written warning for horseplay. (Tr. at 281). Allen, however, admitted that he falsely told Monfort at the time of the incident that he had only threatened to hit Sharp. Monfort based the discipline on what Allen had told them at

the time. It did not know that Allen had been an aggressor. (R. EX. A; Tr. at 304-06, 558-60). If Monfort had known this, Allen would have been discharged. (Tr. at 759-60).

100. There is one instance where a white employee was ultimately retained although Monfort management knew he was the physical aggressor in a fight. William Mettlin, Jr. physically attacked Henry Mentel on or about August 7, 1992. This attack resulted in a cut above Mentel's eye which required stitches at the hospital. (R. EX. BB; Tr. at 154, 267, 282, 318, 677, 760-61). Mettlin attacked Mentel because Mentel was having an affair with Mettlin's wife. (Tr. at 267, 319, 761). Mettlin was discharged effective August 12, 1992 because of his attack on Mentel. (R. EX. BB; Tr. at 677, 761). Mettlin's grievance was denied at the third and fourth steps. (Tr. at 677-78, 763, 797). Mr. DeRaad, however, elected to overrule Bary Carl, who wished to discharge Mettlin, once it was clear the case was proceeding to arbitration. (Tr. at 678, 764, 797). As part of the settlement of his grievance, Mettlin was required to come back to a different shift and department. (Tr. at 678, 796). This constitutes the sole instance in the record where an employee who was a physical aggressor in a fight was returned to employment.

101. This instance does not, however, establish different treatment on the basis of race in this case. First, Mettlin and Complainant Tillman are not similarly situated. Mettlin was provoked by Mentel's sexual contact with Mettlin's wife. Tillman was subjected to a purely verbal provocation. See Findings of Facts Nos. 36-38, 83, 100. See Conclusions of Law Nos. 82.

102. Second, in making a determination as to whether different treatment is based on race, attention must be paid to Monfort's application of its policy in all instances of known physical aggression by an employee. An isolated instance, such as the Mettlin situation, where a company's policy is not applied due to extraordinary circumstances, does not constitute race discrimination when the policy is otherwise applied equally to all other employees, regardless of their race. See Conclusion of Law No. 83. The record in this case reflects that, in all other instances, physical aggressors in fights were discharged regardless of their race. Thus, Rod Dobbs, a white employee, was discharged because he struck Robert Gray, a Black employee, on November 28, 1990. This blow caused a cut over Gray's left eye which required three stitches to close. Gray was not fired. (R. EX. V; Tr. at 750-51). Neal Griggs, a white employee, was discharged for fighting with Dolphus Coleman, a Black employee. (R. EX. W; Tr. at 751, 791-92). Dennis McDowell, a Black employee, was discharged for striking a security guard when the guard denied McDowell admittance at the front gate after McDowell refused to sign in or show his identification. (R. EX. X; Tr. at 752). Jim Martin, a Black employee, was discharged for striking Lynette McIntosh, a Black employee. (R. EX. Y; Tr. at 752-53, 792). Reginald Howze, a Black employee, was discharged for slamming the head of Allen Purvis, a white employee, into a table at the cafeteria several times. (R. EX. Z; Tr. at 753-54, 792). Duane Tate, a Black employee, was discharged for cutting the arm of Leal Bogges, a white employee. (R. EX. AA; Tr. at 754-55). Two white employees, Jerry L. Dixon and Brian Jamieson, were both discharged for fighting with each other. (R. EX. P, S; Tr. at 749-50, 791). (This would be consistent with Respondent's policy allowing both participants in a fight to be discharged when both are equally guilty of physical aggression. See Finding of Fact No. 22B.). The record as a whole does not show a practice of race discrimination by Respondents Monfort in the discipline of employees who are physical aggressors in fighting.

3. The Commission Failed to Show That Complainant Tillman's Attack on Goken Was Justified As a Reasonable Response to Verbal Racial Harassment:

103. As previously noted, Complainant Tillman responded to racial epithets uttered by Goken by "'slamming his head across the table' while telling him, 'I'm going to take that nigger word out of your vocabulary.'" See Finding of Fact No. 36. As Tillman testified, " I grabbed him by a handful of his hair and the first table I seen I immediately started slamming his head off." (Tr. at 245). Tillman "spiked his head off the table six or seven times" before supervisors Slifer and Welton, and his sister, Caroline Tillman, were able to get him to stop. (Tr. at 245-46). The last two slams occurred while the two supervisors were on his back. (Tr. at 245). At his deposition, Complainant Tillman admitted that Goken never threw a punch because "he was too busy kissing the table." (Tr. at 246). Tillman admitted at hearing that he had made good on his promise to slam Goken's head into the table if Goken ever used racial epithets toward him again. (Tr. at 382). See Finding of Fact No. 34.

104. During the processing of his grievance, Tillman admitted to Mr. DeRaad that, if he were faced with the same provocation in the future, he would respond with the same action. (Tr. at 345-46, 741). When DeRaad asked what would have happened if the supervisors had not broken up the altercation, Complainant Tillman replied that "I'd have finished him off" or words to that effect. (Tr. at 662-63).

105. Complainant Tillman's violent physical response to the purely verbal provocation by Mr. Goken was not a reasonable response. Tillman was aware of the option of going to one of the supervisors or stewards to complain about Goken's harassment. (In this regard, it should be noted that there were other stewards and union officials to complain to other than Henry Mentel). See Findings of Fact Nos. 22, 66. This was not a situation where complaints of racial harassment were ignored. If Tillman had made such a complaint, and Monfort's investigation had found his complaint to be accurate, Goken would have received at least a verbal warning. Further harassment by Goken, if reported and verified, would have resulted in Goken's discharge. (Tr. at 799-800). An initial verbal warning informing harassing employees that they will be discharged or suspended if the harassment continues is precisely what Tillman recommended and what he did when he subsequently became a supervisor at an IBP plant. (Tr. at 158, 176-78, 391). Under these circumstances, Tillman's response to a verbal provocation was too extreme. This case, therefore, does not fall within that category of cases where misconduct or poor job performance is excused, and does not constitute a legitimate reason for discipline, because such misconduct or poor job performance is the result of or a response to racial or other prohibited discrimination. See Conclusions of Law Nos. 84-86. The Commission, therefore, has not proven that racial discrimination played a role in Respondents Monfort's decision to discharge Complainant Tillman.

CONCLUSIONS OF LAW:

I. AUTHORITY FOR AND PURPOSE OF CONCLUSIONS OF LAW:

1. The authority requiring that conclusions of law be included in the proposed and final decisions in administrative contested case proceedings is set forth in the Iowa Administrative Procedures

Act (IAPA). Iowa Code S 17A.16(1). The reason such conclusions are made is not solely to reiterate established law on which the agency relies, but also to make law with respect to legal questions raised in the case which have not been resolved by prior legislation, controlling appellate court decisions, agency rulemaking or agency adjudication. *See* B. Schwartz, Administrative Law 213-14 *S* 4.18 (1991). "In exercising adjudicatory power, an agency, like a court, must frequently decide cases on the basis of new doctrines not theretofore applied to the specific problem. If the agency decision becomes a precedent, it guides future conduct in much the same way as though it were a new rule promulgated under the rulemaking power." Id. *See* NLRB v. Wyman-Gordon Co., 354 U.S. 759, 770-71 (1969). Agencies are permitted, under the IAPA, to invoke their own prior decisions as legal authorities in subsequent cases provided those decisions are indexed by name and subject and made available to the public, as the Commission's decisions are. *See* Iowa Code *S*17A.3(1)(d), (2).

2. "Administrative law's most fundamental tenet, codified in Iowa Code section 17A.19(8)(1991), is that administrative decisions are to be made by the agencies, not the courts." Leonard v. Iowa State Board of Education, 471 N.W.2d 815, 815 (Iowa 1991). It is implicit, under the structure of the IAPA, that agencies are generally required to rule on legal questions initially raised before them in contested cases. A court's review of agency action "is carefully confined to the correction of errors of law." Id. A court would hardly be able to determine whether the agency's decision was affected by error of law if the agency failed to address the legal issues raised before it.

3. With certain exceptions, such as challenges to the constitutional validity of a statute, Shell Oil Co. v. Blair, 417 N.W.2d 425, 429-30 (Iowa 1987), if a legal or factual issue is raised before the agency and not decided by it, and an appeal of the agency's action is based upon the issue, the appellate courts will remand the case back to the agency in order to have the question initially decided by the agency. *See* Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 527 (Iowa 1990).

4. This is why, in the Hy-Vee case, the Iowa Supreme Court remanded the question of whether the complaint had been timely filed back to the Commission before the Court would consider the issue. *See* id.; Hoa Thi Blood, 10 Iowa Civil Rights Commission Case Reports 30, 30 (1990). The Commission had not addressed that question, which involved unresolved factual and legal issues. Hy-Vee Food Stores, Inc., 453 N.W.2d at 527. After the Commission issued a decision resolving those questions, it was affirmed by the court which adopted the Commission's legal analysis and found that its findings of fact were supported by substantial evidence. Id. at 530.

II. PERSUASIVE VALUE OF OPINIONS FROM OTHER JURISDICTIONS:

5. Federal court decisions applying Federal anti-discrimination laws are not controlling or governing authority in cases arising under the Iowa Civil Rights Act. *E.g.* Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 831 (Iowa 1978). Nonetheless, they are often relied on as persuasive authority in these cases. *E.g.* Iowa State Fairgrounds Security v. Iowa Civil Rights Commission, 322 N.W.2d 293, 296 (Iowa 1982). Although even decisions of the United States Supreme Court are rejected as persuasive authority when their reasoning is inconsistent with the broad remedial purposes of the Act, Franklin

Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d at 831; Quaker Oats Company v. Cedar Rapids Human Rights Commission, 268 N.W.2d 862, 866-67 (Iowa 1978), its opinions are often entitled to great deference. Quaker Oats Company v. Cedar Rapids Human Rights Commission at 866.

6. In determining the persuasive value of any Federal decision, or decision of another state, or other legal authority, it must be borne in mind that the Act is a "manifestation of a massive national drive to right wrongs prevailing in our social and economic structures of our country," Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 765 (Iowa 1971). Therefore, decisions from other jurisdictions are persuasive only when they are consistent with the controlling authority requiring liberal interpretation and construction of the Iowa Civil Rights Act. When determining the sense and meaning of the written text of a statute providing regulations conducive to public good or welfare, the statute is liberally interpreted. State ex. rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624, 629 (Iowa 1971). When determining the legal effect of its provisions, the Iowa Civil Rights Act "shall be broadly construed to effectuate its purposes," Iowa Code *S* 216.18 (1995), and "liberally construed with a view to promote its objects and assist the parties in obtaining justice." Iowa Code *S* 4.2. "In construing a statute, the court must look to the object to be accomplished, the evils and mischief sought to be remedied, or the purpose to be subserved, and place on it a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it." Monroe Community School District v. Marion County Board of Education, 251 Iowa 992, 998, 103 N.W.2d 746 (1960); Franklin Manufacturing Co. v. Iowa Civil Rights Commission, 270 N.W.2d 829, 832 (Iowa 1978). Therefore, constructions of the statute which "effectively defeat the remedial purpose of Chapter 601A [the Iowa Civil Rights Act]." should be rejected. *See* Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 167 (Iowa 1982).

III. OFFICIAL NOTICE:

7. Official notice may be taken of all facts of which judicial notice may be taken and of matters within the specialized knowledge of the agency. Iowa Code *S* 17A.14(4). Judicial notice may be taken of matters which are "common knowledge or capable of certain verification." In Re Tresnak, 297 N.W.2d 109, 112 (Iowa 1980). Judicial notice may be taken of all papers properly issued or filed or returned in the case then before the adjudicator. Slater v. Roche, 148 Iowa 413, 418, 126 N.W. 921, 927 (1910). *See also* C. McCormick, McCormick on Evidence 927 (2nd ed. 1984). See Findings of Fact Nos. 11, 28.

IV. JURISDICTION AND PROCEDURE:

A. Subject Matter Jurisdiction:

8 Subject matter jurisdiction ordinarily means the authority of a tribunal to hear and determine cases of the general class to which the proceedings in question belong. Tombergs v. City of Eldridge, 433 N.W.2d 731, 733 (Iowa 1988). Mr. Tillman's complaint is within the subject matter jurisdiction of the Commission as the allegations (1) that the Respondents Monfort failed to remedy racial harassment of Complainant Tillman and discharged him due to his race, and (2) that Respondent Goken subjected Tillman to racial harassment are within the statutory

prohibition against unfair employment practices which the Commission has the power to hear and determine. Iowa Code SS 216.6, .15),

9. "It shall be a . . . discriminatory practice for any person . . . to discharge any employee, or to otherwise discriminate in employment against any . . . employee because of the race of such . . . employee." Iowa Code S 216.6.

B. Timeliness and other Statutory Prerequisites:

10. Complainant Tillman's complaint was timely filed within one hundred eighty days of the alleged discriminatory practice. Iowa Code S 216.15(11) (1995). See Finding of Fact No. 2 . All the statutory prequisites for hearing have been met, i.e. investigation, finding of probable cause, attempted conciliation, and issuance of Notice of Hearing. Iowa Code S 216.15 (1995). See Finding of Fact No. 3.

C. Racial Harassment Issue Was Properly Raised By Complainant Tillman's Complaint:

11. Respondents Monfort made the argument that the racial harassment issue was not "properly raised or appropriately before the agency for decision," based on the proposition that "the complainant made absolutely no mention of a claim of a 'hostile work environment' [in his complaint]." Respondents Monfort's Posthearing Brief at 28. This argument is rejected for several reasons.

12. First, the complaint specifically identified "harassment" as one of the race discrimination in employment issues raised by Complainant Tillman. It also set forth an incident of racial harassment by Respondent Goken. See Finding of Fact No. 5. This is sufficient notice under both the pleading standards for a complaint filed under the Iowa Civil Rights Act set forth by the Iowa Supreme Court in Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 768-69 (Iowa 1971) and the standards for notice of hearing set forth by the Iowa Administrative Procedures Act at Iowa Code section 17A.12(2)(d):

13.

> We have before us, however, an administrative proceeding foundationed upon a legislative enactment designed more to implement broad public policy than to adjudicate differences between private parties. We have held technical rules of pleading have no application in an administrative proceeding.
>
> [citations omitted]
>
> In analyzing the proper role of the complaint under the federal act, which is similar in terms, the United States Court of Appeals for the Fifth Circuit has said [citation omitted]:
> "For a lay initiated proceeding it would be out of keeping with the Act to import common-law pleading niceties to this 'charge,' or in turn to hog-tie the subsequent law suit to any such concepts. All that is required is that it give sufficient

> information to enable EEOC to see what the grievance is about. [citation omitted]."
>
> This type of complaint was not designed for the sophisticated or the cognoscenti, but to protect the equality of opportunity among all employees and prospective employees. This protection must be extended to even the most unsophisticated and inarticulate. [citation omitted].
>
> . . .
>
> Here the complaint arguably satisfied the minimum provisions of the statute. [citation omitted]. Respondent, wanting the particulars set out more specifically, could have made appropriate motion.

Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 768-79 (Iowa 1971).

14. The Iowa Administrative Procedures Act provides, in relevant part:, that:

> 2. The notice shall include:
>
> . . .
>
> d. A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

Iowa Code section 17A.12(2)(d). Both the issue of harassment in employment on the basis of race and a specific incident of harassment by Goken were set forth in the notice of hearing. The law section listed in the notice prohibits not only discriminatory discharge but also provides that "[i]t shall be an unfair or discriminatory practice for any: a. Person . . . to otherwise discriminate in employment against . . . any employee because of the . . . race of such . . . employee." Iowa Code S 601A.6 (now 216.6). This is sufficient to meet the notice requirements of Iowa Code section 17A.12. See e.g. Freeland v. Employment Appeal Board, 492 N.W.2d 193, 195-96 (Iowa 1992); Midwest Carbide Corp. v. Occupational Safety and Health Commission, 353 N.W.2d 399, 401-02 (Iowa 1984).

15. Second, Respondents Monfort stipulated at hearing that the Commission's internal administrative law judge had made probable cause findings both with respect to the allegations of racial harassment and termination. See Findings of Fact Nos. 3, 6. A "stipulation" is a "voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate [the] need for proof." BLACK'S LAW DICTIONARY 1269 (5th ed. 1979). Stipulations as to fact are binding on a court, commission or other adjudicative body when, as in this case, there is an absence of proof that the stipulation was the result of fraud, wrongdoing, misrepresentation or was not in accord with the intent of the parties. In Re Clark's Estate, 131 N.W.2d 138, 142 (Iowa 1970); Burnett v. Poage, 239 Iowa 31, 38, 29 N.W.2d 431 (1948). In

light of this stipulation, Respondents Monfort could hardly claim they were not aware that the issue of racial harassment was raised by the complaint.

16. Third, under the following principle, Respondents Monfort are bound by their admissions in their prehearing conference form and their hearing brief that racial harassment by coworkers or a racially hostile work environment were issues in the case. See Findings of Fact Nos. 7-8.

> When an allegation, which militates against the party making it, is made on pleadings or in a brief, and such allegation has not been withdrawn or superseded, it binds the party making it and must be taken as true by a court, administrative agency, or other finder of fact. See Grantham v. Potthoff-Rosene Company, 257 Iowa 224, 230-31, 131 N.W.2d 256 (1965)(cited in Wilson Trailer Co. v. Iowa Employment Security Comm'n, 168 N.W.2d 771, 776 (Iowa 1969)). See also Larson v. Employment Appeal Board, 474 N.W.2d 570, 572 (Iowa 1991).

Maxine Boomgarden, XII Iowa Civil Rights Commission Case Reports 31, 48S-49 (1993).

17. Fourth, these admissions in the hearing brief and prehearing conference form, as well as Respondents Monfort introduction of evidence to defend on the harassment issue, demonstrate that "the party proceeded against 'understood the issue' and 'was afforded full opportunity' to justify its conduct." Golden Grain Macaroni Co. v. FCC, 472 F.2d 882, 885 (9th Cir. 1972)(cited in Fischer v. Iowa State Commerce Comm., 368 N.W.2d 88, 94 (Iowa 1985)). See Findings of Fact Nos. 7-9. This is sufficient to show that the purpose of the notice requirement is met, id., and that the proceeding was valid because Respondents Monfort "had a reasonable opportunity to know of the claims which affect them and to meet those claims." Fischer v. Iowa State Commerce Comm., 368 N.W.2d at 94.

18. Fifth, Respondents Monfort never objected to the testimony elicited during hearing about the racial harassment issue based on the propositions that they either had no notice or that the issue of racial harassment was not properly raised or appropriately before the Commission. See Finding of Fact No. 9. Even if it were assumed that the allegation of racial harassment was, somehow, not set forth in the notice of hearing, Monfort waived any such objection under the following principle:

> The hearing itself may, however, be broader in scope than the notice indicated. . .. . [T]he individual is given actual notice of the new issues when evidence on them is introduced at the hearing. "Actuality of notice there must be, but the actuality, not the technicality, must govern."
>
> . . .
>
> If [the individual] does not request [a continuance to meet the new issues] and elects instead to proceed with the hearing, he waives the claim of surprise. He may not subsequently challenge issues actually litigated; actual notice and adequate opportunity to cure surprise [by requesting a continuance] are all he is entitled to.

B. Schwartz, Administrative Law 307-08 § 6.5 (1991). Cf. Dutcher v. Randall Foods, 546 N.W.2d 889, 893 (Iowa 1996)(same principle applied at district court trial); Golden Grain Macaroni Co. v. FCC, 472 F.2d 882, 885 (9th Cir. 1972)("Actual litigation is often referred to in support of a holding that a party was not prejudiced by initially inadequate pleadings").

19. There is some authority which suggests the above principle should only be applied when the new issue is "closely related", "reasonably related" or "necessarily related" to the issues actually set forth in the notice of hearing. See Lynch v.City of Des Moines, 454 N.W.2d 827, 832-33 (Iowa 1990); Hulme v. Barrett, 449 N.W.2d 629, 633 (Iowa 1989); B. Schwartz, Administrative Law 307-08 § 6.5 (1991). Even if it were assumed that the issue of racial harassment were not set forth in the notice of hearing, or admitted by Respondents Monfort in its Hearing Brief and Prehearing Conference Form, the issue is closely related to the discharge issue and Goken's statement at the cafeteria which are set forth in the notice of hearing. See Finding of Fact No. 10.

D. A Decision May Be Rendered Concerning the Charges Against Respondent Bret Goken Although He Did Not Appear At Hearing:

20. Iowa Code Section 17A.12(3) states:

> If a party fails to appear in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, proceed with the hearing and make a decision in the absence of a party.

Iowa Code section 17A.12(3). In this case, such proper service of the notice of hearing was provided by certified mail, as permitted by Iowa Code section 17A.12(1). See Finding of Fact No. 11. The Notice of Hearing meets all the requirements set forth by Iowa Code section 17A.12(2) including a statement of the time and place of hearing, the legal authority and jurisdiction under which the hearing is held and the particular sections of the statutes involved. (No Commission rules on harassment were cited as there are none). Respondent Goken was also notified of a continuance. See Findings of Fact Nos. 12-13.

21. Respondent Goken was also provided adequate notice that the issue of racial harassment would be tried for the reasons previously set forth. See Finding of Fact No. 13. See Conclusions of Law Nos. 5-7. In addition, it may be presumed, in the absence of evidence to the contrary, that public agencies operate in a regular manner and that individuals and public officials act in accordance with the duties prescribed by applicable rules and statutes. See Cedar Rapids Steel Transportation Company v. Iowa State Commerce Comm., 160 N.W.2d 825, 836 (Iowa 1968)(presumption of regular performance of official actions by commission); City of Cherokee v. Illinois Central Railroad Co., 137 N.W. 1053, 1054 (Iowa 1912)(presumption that persons, and especially public officers, perform their duties faithfully and with due diligence). Thus, it may be presumed that Respondent Goken received notice of the probable cause finding with respect to racial harassment, as required by rule. 161 I.A.C. 3.13(3). It may also be presumed that Goken received copies of the prehearing conference forms filed by the Commission and Respondents Monfort as required by the statutes and rules prohibiting ex parte communication. Iowa Code S 17A.17; 161 I.A.C. 4.4.

E. Individuals May Be Liable For Violation of the Employment Provisions of the Iowa Civil Rights Act:

22.

> 45. The Iowa Civil Rights Act states, in part:
>
> > 1. It shall be an unfair or discriminatory practice for any:
> >
> > > a.. Person to . . . otherwise discriminate in employment . . against any employee because of the . . . race . . . of such . . . employee.
>
> Iowa Code S 216.6(1)(a).
>
> 46. A "person" is defined, in part, as meaning "one or more individuals. . . [or] corporations." Iowa Code S 216.2(10). An employer is defined, in part, as "every . . . person employing employees within the state." Iowa Code S 216.2(6). The prohibition of race discrimination in employment by a "person," as opposed to an "employer," indicates that this prohibition is not limited to employers. The structure of the "unfair employment practices" section of the Act indicates that the broad prohibitions against employment discrimination are intended to apply to "person[s]", Iowa Code S 216.6(1)(a)(d); while other more specific prohibitions, apply to "labor organization[s]," id. at 216.6(1)(b)), or a combination of "employer[s], employment agenc[ies], labor organization[s]," id. at 216.6(1)(c)).

Debra Hoffman, CP # 11-33-25280, slip op. at 28 (Iowa Civil Rights Commission May 15, 1996)(emphasis added).

23. In determining the legal effect of the prohibitions against persons discriminating in employment on the basis of race, the Act is to be "construed broadly to effectuate its purposes." Iowa Code S 216.18. In this case, however, no construction is necessary as the plain and unambiguous language of the act provides that, as an "individual", Respondent Bret Goken is a "person." State v. Burgs, 479 N.W.2d 323, 324 (Iowa 1992)(plain language rule); Le Mars Mutual Insurance Co. v. Bonncroy, 304 N.W.2d 422, 424 (Iowa 1981)(same); Consolidated Freightways Corp. v. Nicholas, 137 N.W.2d 900, 904 (Iowa 1965)(same-commission not permitted to give to a statute an interpretation or construction of which its words are not susceptible). See Iowa Code S 216.2(10)(meaning of "person" includes "one or more individuals"). Thus, Respondent Bret Goken may be held liable as a "person" who otherwise discriminated on the basis of race, Iowa Code S 216.6(1)(a), through his acts of racial harassment perpetrated against the Complainant.

See Debra Hoffman, CP # 11-33-25280, slip op. at 28 (Iowa Civil Rights Commission May 15, 1996).

24. This result differs from that found under Title VII and other civil rights statutes where some courts have held that liability may not be imposed on supervisors or other individual employees because the statutes considered specifically limit civil liability to the "employer." Lenhardt v. Basic Institute of Technology, Inc., 55 F.3d 377, 4 AD Cas. 704, 704 (8th Cir. 1995)(Missouri Human Rights Act); Smith v. St. Bernard Regional Center, 19 F.3d 1254, 64 Fair Empl. Prac. Cas. 478, 479 (8th Cir. 1994)(Title VII); Birkbeck v. Marvel Lighting Company, 30 F.3d 507, 510-11 & n1 65 Fair Empl. Prac. Cas. 669, 671 (4th Cir.), cert. denied ___ U.S. ___ (1994)(ADEA-supervisor not liable for acts of a plainly delegable character-leaves open question of liability for acts of harassment); Lankford v. City of Hobart, 27 F.3d 477, 65 Fair Empl. Prac. Cas. 18, 19 (10th Cir. 1994)(Title VII); Grant v. Lonestar Company, 21 F.3d 649, 64 Fair Empl. Prac. Cas. 1317, 1319 (5th Cir.), cert. denied ___ U.S. ___ (1994)(Title VII); Miller v. Maxwell International Inc., 991 F.2d 583, 61 Fair Empl. Prac. 948, 952 (9th Cir. 1993), cert. denied ___ U.S. ___ (1994)(Title VII and ADEA). Contra, Cross v. State of Alabama, ___ F.2d ___, 65 Fair Empl. Prac. Cas. 1290, 1300-01 (11th Cir. 1994); Jones v. Continental Corp., ___ F.2d ___, 40 Fair Empl. Prac. Cas. 1343, 1347 (6th Cir. 1986).

25. Title VII, for example, states:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. section 2000e-2(a)(quoted in Ball v. Renner, ___ F.3d ___, 67 Fair Empl. Prac. Cas. 1739, 1741 (10th Cir. 1995)(italics in decision)).

26. Three federal appellate courts have recognized that individual liability can be imposed on individuals who are not employers when the statutory prohibitions are addressed to "persons" and not just to "employers." See Grant v. Lone Star Co., 21 F.3d 649, 64 Fair Empl. Prac. Cas. at 1319 (citing Clanton v. Orleans Parish School Board, 649 F.2d 1084, 26 Fair Empl. Prac. Cas. 740 (5th Cir. 1981)). See also Tomka v. The Seiler Corp., 66 F.3d 1295, 68 Fair Empl. Prac. Cas. 1508, 1526 (2nd Cir. 1995); Marshall v. Manville Sales, 6 F.3d 229, 63 Fair Empl. Prac. Cas. 622, 624-25 (4th Cir. 1993). See Conclusions of Law Nos. 28-29.

27. Every appellate court in the nation which has considered this issue with respect to state civil rights statutes where the prohibitory language is directed at "person[s]" has found that individual employees may be held liable under such statutes. Thus, the state appellate courts of California have held that individual liability may be imposed on supervisory personnel under state civil rights anti-retaliation and anti-harassment statutes prohibiting such acts by "person[s]". Matthews v. Superior Court, 34 Cal. App. 4th 598, 40 Cal. Rptr. 2nd 350, 67 Fair Empl. Prac. Cas. 1127, 1129-31 (Ca. Ct. App. 1995); Page v. Superior Court, 31 Cal. App. 4th 1206, 37 Cal. Rptr. 529, 66 Fair Empl. Prac. Cas. 1798, 1804 (Ca. Ct. App. 1995).

28. The Fourth Circuit Court of Appeals (which, under the ADEA, denied the imposition of personal liability on supervisors performing plainly delegable functions in Birkbeck) rejected an argument that an individual supervisor could not be held liable under the West Virginia Human Rights Act because a particular section of the act only prohibited "any employer" from discriminating against any individual on the basis of sex. Marshall v. Manville Sales, 6 F.3d 229, 63 Fair Empl. Prac. Cas. 622, 624-25 (4th Cir. 1993). The Court rejected the argument because the supervisor could be held personally liable under another section of the statute which forbade "any person . . . to . . . aid, abet . . .any person to engage in any of the unlawful discriminatory practices defined in this chapter." Id. at 625. (emphasis added). This same analysis was later adopted by the Supreme Court of West Virginia. Syllabus Point 4. Holstein v. Norandex, 461 S.E.2d 473, 68 Fair Empl. Prac. Cas. 1780, 1781 (W. Va 1995). The court noted that to deny the imposition of liability on individual supervisors was "contrary to the plain meaning of the statutory language and contrary to the very spirit and purpose of this legislation." Id. at 68 Fair Empl. Prac. Cas. 1783.

29. An identical result occurred with respect to the New York Human Rights Law in the Second Circuit decision of Tomka v. The Seiler Corp., 66 F.3d 1295, 68 Fair Empl. Prac. Cas. 1508, 1526 (2nd Cir. 1995). In the same decision in which the court held that individual liability could not be imposed under Title VII, id at 1525, it held that such liability could be imposed under the aiding and abetting section of the New York law which addressed "any person." Id. at 1526. The same result, with respect to the state act, was reached by the New York Appellate Division. Steadman v. Sinclair, 636 N.Y.S.2d 325, 326 (N.Y. App. Div. 1996); Peck v. Son Music, 632 N.Y.S.2d 963, 963 (N.Y. App. Div. 1995).

30. Finally, it should be noted that the persuasive authority of Professor Bonfield's article, which set forth a proposed act which served as the basis of the Iowa Civil Rights Act, indicates that the word "person" was included in the Act to ensure that employment discrimination provisions of the act would reach non-employer entities, such as employment agencies. Bonfield, A., State Civil Rights Statutes; Some Proposals, 40 Iowa L. Rev. 1067, 1107-08 (1964). See United States Jaycees v. ICRC, 427 N.W.2d 450, 454 (Iowa 1988)(relying on the Bonfield article as persuasive authority after noting that the language of the act mirrored that proposed in the article). Based on all the above authorities, the imposition of individual liability for violation of the Act is appropriate.

F. Respondents Monfort Failed to Establish Their Claim of Laches:

1. Respondents Monfort Waived Any Claim of Laches:

31. Respondents Monfort failed to establish their claim of laches for three reasons. First, by failing to raise the issue of laches at any point prior to the conclusion of the hearing, Respondents Monfort waived the issue. See Foods, Inc. v. Iowa Civil Rights Commission, 318 N.W.2d 162, 170 (Iowa 1982). An objection to unreasonable delay "must be made before a case has proceeded through a full-blown evidentiary hearing." Id. (emphasis added).

32. Second, it is "extremely rare for laches to be effectively invoked" when a complainant has filed her administrative civil rights complaint with the agency within the time provided for by the

pertinent statute of limitations. See Bouman v. Block, 940 F.2d 1211, 1227, 60 Fair Empl. Prac. Cas. 1000, 1011 (9th Cir. 1991)(applying this principle when the plaintiff had timely filed her administrative complaint with the EEOC within the 300 day statute of limitations). In this case, the complaint was timely filed with the Iowa Civil Rights Commission. See Conclusion of Law No. 10.

33. In determining whether a case is one of those rare ones where laches applies, it must be remembered that "the doctrine [of laches] is applied to do, and not to defeat justice." Regal Insurance Company v. Summit Guaranty Corp., 324 N.W.2d 697, 704 (Iowa 1982). The doctrine is based upon the public policy which seeks to discourage stale claims. Davidson v. Lengen, 266 N.W.2d 436, 439 (Iowa 1978).

34. Third, Respondents Monfort failed to prove unreasonable delay and material prejudice, elements which must be proven by the defendant, Brewer v. State 446 N.W.2d 803, 805 (Iowa 1989), by clear, convincing and satisfactory evidence. Chicago, Rock Island, and Pacific Railroad Company v. City of Iowa City, 288 N.W.2d 536, 541 (Iowa 1980). Laches must be supported by pleaded proof. Argument does not suffice. In Re Lunt, 235 Iowa 62, 78, 16 N.W.2d 25 (1944). See Findings of Fact Nos. 16-17.

35. The passage of time from the date of filing on July 26, 1990 to the hearing in August of 1995, is shown in the record. See Finding of Fact No. 16. Such evidence is not sufficient to prove delay, let alone unreasonable delay. EEOC v. Warshawsky & Co., 56 Fair Empl. Prac. Cas. 889, 896 (N.D. Ill. 1991)(the bare fact that 4 years elapsed between filing of complaint and EEOC's filing of suit does not demonstrate delay).

36. "Prejudice must be shown. Prejudice 'cannot be inferred merely from the passage of time.'" C.O.P.E.C. v. Wunschel, 461 N.W.2d 840, 846 (Iowa 1990)(quoting with approval Cullinan v. Cullinan, 226 N.W.2d 33, 36 (Iowa 1976)) See e.g. Brewer v. State, 446 N.W.2d 803, 805 (Iowa 1989)(mere passage of time does not demonstrate unreasonable delay in asserting rights which cause another prejudice).

V. RACIAL HARASSMENT:

A. Proper Order and Allocation of Proof Under the Hostile Environment Theory:

37. "It is questionable whether the traditional burden-shifting analysis is appropriate or necessary in hostile work environment cases where the alleged discrimination does not involve deprivation of a tangible job benefit." Lynch v. City of Des Moines, 454 N.W.2d 827, 834 n.6 (Iowa 1990)(citing Henson v. City of Dundee, 682 F.2d at 905 n.11 and Katz v. Dole, 709 F.2d at 255-56)). This is so because the burden shifting analysis, utilized in disparate treatment cases relying primarily on circumstantial evidence as the means of proof, "serves to 'progressively sharpen the inquiry into the elusive factual question of intentional discrimination,' . . . in . . . case[s] where prohibited criteria and legitimate job related criteria often blend in the employment decision." Henson v. City of Dundee, 682 F.2d at 905 n.11. In cases of racial harassment involving the repeated use of racist remarks or epithets, or physical harassment based on race, or other obviously race based conduct, the factual question of intentional discrimination is not at all

elusive. See Henson v. City of Dundee, 682 F.2d at 905 n.11 (sexual harassment creating offensive environment does not present elusive factual question of intentional discrimination). Therefore, the Commission, in its adjudicative capacity, has not used a burden shifting order and allocation of proof in harassment cases. Rather, the Commission, as the party with the burden of proof, Iowa Code S 216.15(7), is required to prove, by a preponderance of the evidence, all of the elements of a racial harassment case. E.g. Dorothy A. Abbas, 12 Iowa Civil Rights Commission Case Reports 1, 22 (1994)(retaliatory harassment); Cristen Harms, 11 Iowa Civil Rights Commission Case Reports, 89, 124 (1992)(sexual harassment); Royd Jackman, 11 Iowa Civil Rights Commission Case Reports 70, 79 (1991)(racial harassment).

B. Elements of the Racial Harassment Case:

38. The Commission may establish a valid claim of racial harassment by proving the following elements:

1) The Complainant is a member of a protected class [i.e. he is Black];

2) He was subjected to unwelcome racial harassment;

3) The harassment was based upon his protected class status [i.e. his race];

4) The harassment affected a term, condition, or privilege of employment [e.g. his working environment], and;

5) The employer knew or should have known of the harassment and failed to take prompt and appropriate remedial action.

See Greenland v. Fairtron Corp., 500 N.W.2d 36, 38 (Iowa 1993)(requirements for sex harassment case); Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 632 (Iowa 1990) (religious harassment); Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 834 (Iowa 1990)(requirements for sexual harassment case); Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 378 (Iowa 1986)(racial harassment); Edmunds v. Mercy Hospital, 503 N.W.2d 877, 879 (Iowa Ct. App.1993)(sex harassment); Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982)(sex harassment). Proof of first four elements with respect to an individual who participates in harassment by coworkers, such as Respondent Goken, is enough to establish liability for the harasser as these elements define the duty violated by the individual harasser, i.e. the duty as a "person" to refrain from "otherwise discriminat[ing] in employment," Iowa Code S 216.6(1)(a), by committing acts of racial harassment. See Conclusions of Law Nos. 22-30. All four elements were proven against Goken. See Finding of Fact No. 46A. All five elements must be proven against an employer, such as Respondents Monfort, who is charged with failure to remedy racial harassment committed by coworkers. See e.g. Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 834 (Iowa 1990)(requirements for sexual harassment case); Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 378 (Iowa 1986)(racial harassment). The fifth element was not proven against Respondents Monfort. See Findings of Fact Nos. 48, 67A.

C. Protected Class Status of Complainant Tillman:

39. It is established in the record that Complainant Tillman is Black and is protected against discrimination in employment on the basis of race. Iowa Code S 216.6. See Finding of Fact No. 24.

D. Complainant Tillman Was Subjected to Unwelcome Racial Harassment:

40. "The threshold for determining that [racial] conduct is unwelcome is whether it was uninvited and offensive." Cf. Burns v. McGregor Electronic Industries, Inc., 989 F.2d 959, 962 (8th Cir. 1993)(unwelcome sexual harassment). The racial conduct "must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded it as undesirable or offensive." Cf. Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982), quoted in Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990)(unwelcome sexual harassment). The unwelcome nature of the racial conduct directed toward Complainant Tillman is established in the record when viewed as a whole. He found the racial conduct of Respondent Goken and other employees to be offensive. He complained about some of the initial harassment to Respondents Monfort. See Findings of Fact No. 25-40. Although the record must be viewed as a whole, such complaints are often persuasive evidence that the conduct was unwelcome. Fair Employment Practices (BNA) 405:6681, 405:6685 "EEOC: Policy Guidance on Sexual Harassment" (March 19, 1990). See Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990).

E. The Harassment Was Based on Complainant Tillman's Protected Class Status, I.e. His Race:

41. It is established in the record that the harassment sustained by Complainant Tillman was directed toward him because he is Black. See Finding of Fact No. 24. This element may be met by proof of the use of racial epithets. See e.g. Schlei, Employment Discrimination Law: 1987-1989 Supplement 35 (1991); Schlei, Employment Discrimination Law: Five Year Cumulative Supplement 88-90 (1989). In this case, it has been established that the harassment was based on Complainant Tillman's race because the harassment involves both repeated racial epithets and an instance of physical action directed against Tillman accompanied by verbal racial harassment. See Finding of Fact Nos. 25-40. The presence of "insulting comments aimed at [the complainant] [which] were particularly reserved for [Blacks}," also justifies the conclusion that the harassment was due to the Complainant's race. Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990)(insulting comments which were particularly reserved for women demonstrates harassment due to sex).

F. The Harassment Affected A Term or Condition of Complainant Tillman's Employment, I.e. His Working Environment:

1. Loss of Tangible Job Benefits Is Not Required To Establish That Harassment Has Affected A Term, Condition or Privilege of Employment:

42. Although racial harassment of Complainant Tillman did not directly result in "the loss of a tangible job benefit," such a loss need not be proved in order to meet the requirement that a term,

condition or privilege of employment was affected by the harassment. Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990). His working environment is a condition of his employment. Thus, the creation of a hostile or abusive working environment is enough to show that a condition of employment has been affected. See id.; Royd Jackman, 11 Iowa Civil Rights Commission Case Reports 70, 79 (1991).

2. The Standard for Determining When Harassment In the Workplace Violates the Iowa Civil Rights Act Focuses on the Pervasiveness and Severity of the Harassing Conduct:

43. In determining whether a hostile or abusive working environment has been created, the Supreme Court of Iowa has focused on the pervasiveness and severity of the harassing conduct. "A hostile working environment is caused by discriminatory conduct or harassment which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 632 (Iowa 1990). "Where . . . harassment in the workplace is so pervasive and severe that it creates a hostile or abusive work environment, so that the [complainant] must endure an unreasonably offensive environment or quit working, the . . . harassment affects a condition of employment." Lynch v. City of Des Moines, 454 N.W.2d 827, 834 (Iowa 1990)(sex harassment case).

44. The Supreme Court of the United States has provided a standard which also focuses on the pervasiveness and severity of the harassment in determining whether there is an illegal hostile working environment: "When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment' . . . Title VII is violated. " Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 370 (1993).

3. The Totality of the Circumstances Must Be Examined to Determine Whether a Hostile or Abusive Working Environment Exists:

45. Under both the Iowa Civil Rights Act and Title VII of the Civil Rights Act of 1964, the totality of the circumstances in the case must be examined to determine whether a racially hostile or abusive working environment exists. Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 633-34 (Iowa 1990); Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 371 (1993).
46.

> The existence of a hostile or abusive working environment must be established by the totality of the circumstances. . . . Whether . . . use of . . . slurs is continuous, severe and pervasive enough to rise to a violation of the Iowa Civil Rights Act is a question of fact. . . .
>
> It is well established that the "mere utterance of a . . . ethnic or racial epithet which engenders offensive feelings in an employee" does not affect the terms, conditions and privileges of employment to a significant degree. . . . Discriminatory comments that are "merely part of casual conversation, are accidental or are sporadic do not trigger . . . sanctions." . . .

> On the other hand, the determination of whether defendant's conduct is sufficiently severe and pervasive to constitute [sexual] harassment does not turn solely on the number of incidents alleged by plaintiff. . . . The totality of the circumstances requires the factfinder to examine the severity, as well as the number, of the incidents of harassment. . . . In some situations the severity of the offensive conduct may lessen the need for sustained exposure. The prima facie showing in a hostile environment case is likely to consist of evidence of many or very few acts or statements by the defendant which, taken together, constitute harassment.

Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 633-34 (Iowa 1990)(citations omitted)(emphasis added).

47 In the Vaughn case, the Court considered a situation where the plaintiff and other employees were subjected to generally abusive remarks by one Mueller, a supervisor, on a daily basis. Vaughn, 459 N.W.2d at 630, 631, 633. In addition, plaintiff was subjected to anti-Catholic remarks by his supervisor on three days out of a three month period. Id. at 631. On a fourth day, he was also initially refused time off to go to church. Id. The refusal was rescinded four hours later. Id. The Court held that this set of facts presented "a close question" on the issue of "whether Mueller's behavior was sufficiently severe and pervasive to alter a condition of his employment." Id. at 634. The court did not resolve the question, but based its decision for the employer on the employer's prompt and appropriate response to the harassment. Id. at 634-35. The harassment of the Complainant in this case involved derogatory racial remarks which were far more frequent than was the case in Vaughn. See Finding of Fact No. 43.

48.

> But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 371 (1993)(Title VII case)(emphasis added).

49. All of the above factors were considered in reaching the conclusion that Complainant Tillman's working environment was hostile or abusive. See Findings of Fact Nos. 43-46.. With respect to the factor of interference with work performance, it is sufficient to prove that a reasonable person subjected to such harassment would find, "as the plaintiff did, that the harassment so altered work conditions as to 'ma[k]e it more difficult to do the job.'" Harris v. Forklift Systems, Inc., 114 S.Ct. at 372 (Ginsburg, J., concurring)(quoting Davis v. Monsanto Chemical Co., 858 F.2d 345, 349 (6th Cir. 1988)). It is not necessary to show that the Complainant's "'tangible productivity has declined as a result of the harassment.'" Id. (Ginsburg, J. concurring)(quoting Davis at 349)).

50. Another factor showing that the racial harassment was sufficiently severe and pervasive to affect the terms and conditions of Complainant Tillman's employment is that the harassment was inflicted by more than one coworker. Lindemann & Kadue, Sexual Harassment in Employment Law 178-79 (1992). See Finding of Fact No. 25.

4. Physical Harassment May Often Have A More Severe Impact Than Verbal Harassment:

51. Physical racial harassment will often have a greater impact than verbal harassment. Royd Jackman, 11 Iowa Civil Rights Commission Case Reports 70, 80 (1991)(Black employee physically grabbed by harassing coworker). The Equal Employment Opportunity Commission has recognized that, while a hostile working environment claim usually requires a pattern of offensive conduct, "the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical." Fair Employment Practices (BNA) 405:6681, 405:6690-91 "EEOC: Policy Guidance on Sexual Harassment" (March 19, 1990)(emphasis added). See also Carrero v. New York City Housing Authority, 890 F.2d 569, 578 (2nd Cir. 1989). The Complainant was subjected to one incident of physical harassment. See Findings of Facts Nos. 26.

5. Pervasive Verbal Harassment Alone May Be Sufficient to Establish a Hostile or Abusive Working Environment:

52. Verbal harassment can also create a hostile and abusive working environment: Given the nature and extent of the language repeatedly directed at Complainant Tillman at Respondents Monfort, the verbal harassment alone would be sufficient to establish a hostile and abusive work environment. See e.g. Royd Jackman, 11 Iowa Civil Rights Commission Case Reports 70, 80 (1991); Frank Robinson, 11 Iowa Civil Rights Commission Case Reports 55, 57 (1991); Schlei, Employment Discrimination Law: 1987-1989 Supplement 35 (1991); Schlei, Employment Discrimination Law: Five Year Cumulative Supplement 88-90 (1989). See Findings of Fact Nos. 43-46.

6. The Effect of Combined Verbal and Physical Racial Harassment Will Intensify the Hostility of the Environment and Increase the Likelihood That The Environment Will Be Found to Be Abusive:

53. "When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found." Fair Employment Practices (BNA) 405:6681, 405:6691 "EEOC: Policy Guidance on Sexual Harassment" (March 19, 1990) (sex harassment guidance). The combined verbal and physical harassment sustained by Complainant Tillman is more than sufficient to establish the existence of a hostile and abusive working environment. See Findings of Fact Nos. 44, 46.

7. The Commission Has Proven That The Working Environment At Respondents Monfort Be Shown to Have Been Considered Hostile and Abusive When Viewed From Both the Perspectives of the Complainant and of a Similarly Situated Reasonable Person:

54. The Complainant's working environment was found to be considered by him to be hostile or abusive. It was also found that such an environment would be considered hostile and abusive by any reasonable person. See Finding of Fact No. 40. Thus, the evidence in this case met both the subjective requirement that the Complainant personally find the conduct to be hostile or abusive, and the objective requirement that a similarly situated reasonable person would find such conduct be hostile or abusive. See Harris v. Forklift Systems, Inc,, 510 U.S. 17, 114 S. Ct. 367, 370, 371 (1993).

G. The Commission Has Not Proven That Respondents Monfort Failed to Take Prompt and Appropriate Remedial Action For Those Actions of Racial Harassment of Which It Knew or Should Have Known:

55. The Commission has failed to prove that Respondents Monfort knew or should have known of the racial harassment sustained by the Complainant beyond that initially reported by him with respect to Mr. Mentel and that ultimately reported concerning Bret Goken after the cafeteria incident. See Findings of Fact Nos. 47-48. The Commission has not proven that Respondents Monfort failed to take prompt and appropriate remedial action concerning that harassment of which it was aware. See Findings of Fact Nos. 67A-84. Thus, the Commission has failed to establish the last element necessary to establish Monfort's liability for hostile environment racial harassment committed by coworkers. See Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 632, 634 (Iowa 1990)(harassment by supervisor); Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 835 (Iowa 1990)(harassment by coworkers).

1. Actual or Constructive Knowledge of Harassment:

56. With the exception of the reported harassment, Respondents Monfort did not have actual knowledge of the harassment. "Where supervisors have witnessed co-worker harassment firsthand, courts have held that the employer had actual knowledge." Lindemann & Kadue, Sexual Harassment in Employment Law 242 (1992). Actual knowledge is also shown when either lower level first line supervisors or higher level management receive complaints about racial harassment. Id. This is true even when the first level supervisor did not report the harassment to higher levels of management. Id. This knowledge was shown only with respect to the harassment reported to Monfort by Complainant Tillman. See Findings of Facts Nos. 47-48

57. Constructive knowledge of harassment is imputed to the employer when the acts of harassment are "so numerous that the employer would have had to know of them." Id. at 243. An employer will be charged with constructive knowledge of the harassment "if management-level employees . . . in the exercise of reasonable care should have known about the campaign of harassment." Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 41 Fair Empl. Prac. Cas. 721, 724 (7th Cir. 1986). "[An employer] is unlikely to know or have reason to know of casual, isolated, and infrequent slurs; it is only when they are so egregious, numerous, and concentrated as to add up to a campaign of harassment that the employer will be culpable for failing to discover what is going on and to take remedial steps." Id. These authorities tend to emphasize the number of incidents required to show constructive knowledge while a relatively few incidents of sufficiently severe harassment will meet the combined standard of pervasiveness and severity needed to show a hostile working environment. See Conclusions of Law Nos. 45-47.

58. Under the facts of this case, it cannot be said that the employer would have had to have known of that harassment of Complainant Tillman which was neither observed by its supervisors nor reported to it. See Findings of Fact Nos. 49-67. The Commission's case was not assisted by the relatively sporadic incidents of alleged verbal racial harassment against employees other than Complainant Tillman. See Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 633 (Iowa 1990). See Findings of Fact Nos. 52-65. In one of these instances, where Caroline Tillman was referred to as a "scab," it was noted there was an absence of evidence to support the conclusion that the use of this epithet was racially motivated. See Finding of Fact No. 59. It should be noted, however, that when there is evidence to support the proposition that "scab" or other nonracial words are used as "code words" to demean Blacks, such use may constitute racial harassment. Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1883 (3rd Cir. 1996). See Chauffeurs, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission, 394 N.W.2d 375, 379 (Iowa 1986)("scab" combined with racial references as part of acts of harassment).

59. Nor has it been shown that Respondents Monfort's lack of knowledge of harassment was due to inadequate policies on racial harassment. While Monfort's written policies may not have been as detailed or extensive as some employers, e.g. Gary v. Long, 59 F.3d 1391, 1393-99, 68 Fair Empl. Prac. Cas. 581, 585-8 (D.C. Cir. 1995), they do define and prohibit racial harassment and encourage employees having a problem with another employee to contact a supervisor, the personnel department or a union steward. They are, therefore, sufficiently "calculated to encourage victims of harassment to come forward," Meritor Savings Bank v. Vincent, 477 U.S. 57, 73 (1986) to defeat the proposition that Monfort's lack of knowledge about the harassment of Complainant Tillman was due to its inadequate policies. See Finding of Fact No. 66. Whether these policies were sufficiently detailed so as to constitute an affirmative defense with respect to harassment not reported to the employer, see Meritor at 477 U.S. at 73, is not an issue in this case.

2. Prompt and Appropriate Remedial Action:

60. "An employer cannot stand by and permit an employee to be harassed by his co-workers." Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 634 (Iowa 1990)(citing DeGrace v. Rumsfeld, 614 F.2d 796, 803 (1st Cir. 1980)). The requirement for "prompt and appropriate remedial action," Lynch v. City of Des Moines, 454 N.W.2d 827, 833, 835 (Iowa 1990), imposes "a reasonable duty on an employer who is aware of discrimination in the workplace to take reasonable steps to remedy it." Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 634 (Iowa 1990).

61. Factors considered here in determining that this duty was met were "the gravity of the harm, the nature of the work environment, and the resources available to the employer." Id. "'[Such] appropriate corrective action' . . . require[s] some form, however mild, of disciplinary measures. Action is 'corrective' only if it contributes to the elimination of the problem at hand. Because disciplinary measures are more likely to decrease the likelihood of repeated harassment than a mere request to stop the behavior, disciplinary measures are [required]." Intlekofer v. Turnage, 973 F.2d 773, 778, 59 Fair Empl. Prac. Cas. 929 (9th Cir. 1992)(construing 29 C.F.R. S.1604.11(d) of the EEOC Guidelines on Sexual Harassment)). Under these standards, the

warning given Mentel for the name calling harassment of the Complainant and the suspension given Goken for provoking the fight with the Complainant through racial harassment were appropriate remedies. See Findings of Fact Nos. 70, 84. Strong, clear oral warnings will be appropriate measures in many cases where the harassment of which the employer is initially aware is similar to that reported to have been committed by Henry Mentel and his coworkers in this case:

At the first sign of . . . harassment, an oral warning in the context of a counseling session may be an appropriate disciplinary measure if the employer expresses strong disapproval, demands that the unwelcome conduct cease, and threatens more severe disciplinary action in the event the conduct does not cease. [This is an appropriate] remedy in a case . . . where the harassing conduct is not extremely serious and the employer cannot elicit a detailed description concerning the occurrence from the victim. . . . [C]ounseling is sufficient only as a first resort. If the harassment continues, limiting discipline to further counseling is inappropriate. Instead, the employer must impose more severe measures in order to ensure that the behavior terminates. [T]he extent of the discipline depends on the seriousness of the conduct.

Intlekofer v. Turnage, 973 F.2d at 779-80 (emphasis added). See Vaughn v. Ag Processing, Inc., 459 N.W.2d 627, 635 (Iowa 1990)(harasser received written and verbal reprimands "and told that if there were any reoccurrences of 'inappropriate behavior,' he would be discharged").

62. Remedial action has a two fold purpose. The first is to stop any harassment which is underway. The second is to deter future harassment. These purposes are the bench marks against which the appropriateness of remedial action is measured. Fuller v. City of Oakland, 47 F.3d 1522, 1528, 67 Fair Empl. Prac. Cas. 992 (9th Cir. 1995)(citing Ellison v. Brady, 924 F.2d 872, 882, 54 Fair Empl. Prac. Cas. 1346 (9th Cir. 1991)). "If 1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach." Id.

63. The application of these benchmarks, however depends on employer being in a position where it knew or should have known of the acts of harassment. See Conclusion of Law No. 38. Thus, if there are subsequent acts of harassment which occur despite the remedies applied, and it is not shown that the employer knew or should have known about the new acts of harassment, it cannot be held liable for these subsequent acts. See e.g. Jeffries v. Metro-Mark, Inc., 45 F.3d 258, 259-61 (8th Cir. 1995)(no liability found where employer took corrective action with respect to harassment which it knew about, although plaintiff testified as to multiple acts of harassment of which employer was not aware); Higgins v. Gates, 578 F.2d 281, 282, 283 (10th Cir. 1978)(no liability found where employer took corrective action with respect to two acts of harassment and in absence of finding that employer was or should have been aware of other acts creating a hostile environment). Thus, although the corrective action taken by Monfort with respect to the harassment by Mentel was ultimately ineffectual, as Mentel's harassment continued, the employer is not liable as it was not aware of these new acts of harassment.

64. Another aspect of appropriate remedial action, which was undertaken in the instant case, was to inform the Complainant of the efforts to counter the harassment. See Spicer v. Virginia, 66 F.3d 705, 708 (4th Cir. 1995)(no liability-employee informed of steps taken to address her complaint); Barrett v. Omaha Nat. Bank, 728 F.2d at 426 (no liability- employee informed of

disciplinary steps taken against her harassers); College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 508 N.E.2d at 594 (liability found-failed to inform employee of staff meeting where her complaint was investigated). See Finding of Fact No. 70.

65. The past practice of Respondents Monfort indicates that a prompt and appropriate response would have been undertaken if the continuing harassment of Complainant Tillman had been reported. Such response would have included investigation of the complaint, see Vaughn v. Ag Processing, Inc., 459 N.W.2d at 633-34 (prompt and thorough investigation a factor in finding employer not liable), and disciplinary actions ranging from warning to discharge. See Vaughn at 635 (harasser received written and verbal reprimands "and told that if there were any reoccurrences of 'inappropriate behavior,' he would be discharged."). Occasionally, offending employees were required to apologize to their victims or otherwise commit to ending their harassment. See Vaughn v. Ag Processing, Inc., 459 N.W.2d at 634 (harasser apologized to employee for his swearing). An apology alone, however, is not sufficient remedial action as the law "requires more than a mere request to refrain from discriminatory conduct." Davis v. Tri-State Mack Distributors, 981 F.2d 340, 343 (8th Cir. 1992).

66. There were flaws in Respondents Monfort's handling of incidents of harassment. An harasser could be a repeat offender who would receive only repeated verbal warnings because inadequate records were kept of prior verbal warnings. See Melsha v. Wickes Companies, Inc., 69 Fair Empl. Prac. Cas. 45 (Minn. Ct. App. 1990)(inadequate records resulting in insufficient discipline enabled harassment). There is no evidence, however, that this affected Complainant Tillman's situation. See Finding of Fact No. 80. Removal of graffiti was unacceptably slow. Waltman v. International Paper Co., 875 F.2d 468, 50 Fair Empl. Prac. Cas. 179, 189 (5th Cir. 1989)(citing Bennett v. Caroon and Black Corp., 845 F.2d 104, 105-06 (8th Cir. 1988)(employer failed to take prompt and appropriate remedial action when it waited one day to removed offensive cartoon depicting plaintiff in men's restroom)). Nonetheless, there is no evidence in the record that Complainant Tillman was affected by such graffiti. See Finding of Fact No. 81.

67. A possible flaw in Monfort's response to Tillman's complaint of harassment by Mentel was its failure to follow up and check with Tillman to ascertain if he was experiencing any further harassment. Cf. Fair Employment Practices (BNA) 405:6681, 405:6700 "EEOC: Policy Guidance on Sexual Harassment" (March 19, 1990) ("the employer should make follow-up inquiries to ensure the harassment has not resumed."). The authority relied on by the EEOC guidelines for this proposition is a federal district court decision. Fair Employment Practices (BNA) at 405:6701 n.39 (citing Delgado v. Lehman, 665 F. Supp. 480, 43 Fair Empl. Prac. Cas. 593 (E.D. Va. 1987)). In Delgado higher level management responded to complaints about sexual harassment by a supervisor by conducting a meeting, which included the supervisor and women under his supervision, in order to discuss the hostile environment and "clear the air." Delgado, 43 Fair Empl. Prac. Cas. at 596, 600. The only specific action taken as a result of the meeting was the suggestion by management "that everyone have lunch following the meeting." Id. There were also some unspecified recommendations made by management. Id. at 600. Management did no follow up to determine whether the suggestions had been followed or if meeting had succeeded in eliminating the harassment. Id. at 597, 600. There is nothing to indicate that the kind of warnings that were given in the instant case were given in Delgado.

Given this difference in the fact situations between this case and Delgado, it cannot be said that the Monfort management failed to take prompt and appropriate action solely because it failed to conduct further follow-up on Tillman's complaint concerning the harassment by Mentel and his coworkers.

VI. DISCHARGE:

A. Distinction Between "Burden of Persuasion" and "Burden of Production:

68. The order and allocation of proof used in this case is that initially set forth in the United States Supreme Court decision of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In order to understand the McDonnell Douglas order and allocation of proof, it is necessary to note the distinction between "burden of persuasion" and "burden of production":

69. The "burden of persuasion" in any proceeding is on the party which has the burden of persuading the finder of fact that the elements of his case have been proven. BLACK'S LAW DICTIONARY 178 (5th ed. 1979). The burden of proof in this proceeding was on the Commission to persuade the finder of fact that disability discrimination has been proven. See Iowa Code S 216.15(7)(burden of proof on Commission). Of course, in discrimination cases as in all civil cases, the burden of persuasion is "measured by the test of preponderance of the evidence," Iowa R. App. Pro. 14(f)(6).

70. The burden of persuasion must be distinguished from what is known as "the burden of production" or the "burden of going forward." The burden of production refers to the obligation of a party to introduce evidence sufficient to avoid a ruling against him or her on an issue. BLACK'S LAW DICTIONARY 178 (5th ed. 1979).

B. Summary of the Order and Allocation of Proof In Disparate Treatment Cases Where the McDonnell Douglas Analysis is Used:

71. The order and allocation of proof known as the "pretext," or "McDonnell-Douglas" method was described in the Dorene Polton case. Although the cases refer to the complainant's burdens of establishing a prima facie case and pretext, those burdens are borne here by the Commission as this proceeding is before this agency and not a court. Iowa Code S 216.15(6):

> 25. In the typical discrimination case, in which the Complainant uses circumstantial evidence to prove disparate treatment on a prohibited basis, the burden of production, but not of persuasion, shifts. Iowa Civil Rights Commission v. Woodbury County Community Action Agency, 304 N.W.2d 448 (Iowa Ct. App. 1981). These shifting burdens of production "are designed to assure that the [Complainant has] his day in court despite the unavailability of direct evidence." Trans World Airlines v. Thurston, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed. 2d 523, 533 (1985).
>
> 26. The Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. Trobaugh v. Hy-Vee Food

Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). This showing is not the equivalent of an ultimate factual finding of discrimination. Furnco Construction Corp. v. Waters, 438 U.S. 579 (1978). Once a prima facie case is established, a presumption of discrimination arises. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

27. The burden of production then shifts to the Respondent, i.e. the Respondent is required to produce evidence that shows a legitimate, non- discriminatory reason for its action. Id.; Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). If the Respondent does nothing in the face of the presumption of discrimination which arises from the establishment of a prima facie case, judgment must be entered for Complainant as no issue of fact remains. Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). If Respondent does produce evidence of a legitimate non-discriminatory reason for its actions, the presumption of discrimination drops from the case. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

28. Once the Respondent has produced evidence in support of such reasons, the burden of production then shifts back to the Complainant to show that the reasons given are pretextual. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986); Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988). Pretext may be shown by "persuading the [finder of fact] that a discriminatory reason more likely motivated the [Respondent] or indirectly by showing that the [Respondent's] proffered explanation is unworthy of credence." Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 178 (Iowa Ct. App. 1988) (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981)).

29. This burden of production may be met through the introduction of evidence or by cross- examination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S. Ct. 1089, 1095, 67 L. Ed. 2d 207, 216 & n.10 (1981). The Complainant's initial evidence and inferences drawn therefrom may be considered on the issue of pretext. Id. at n.10.

Dorene Polton, 11 Iowa Civil Rights Commission Case Reports 152, 162 (1992).

C. Complainant's Prima Facie Case:

72. While a prima facie case of racial discrimination may be established through evidence of "differences in treatment," Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 516 (Iowa 1990)(quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)), it may also be established through a "showing of treatment so at variance with what would reasonably be anticipated absent discrimination that discrimination is the probable explanation." City of Minneapolis v. Richardson, 239 N.W.2d 197, 202 (Minn. 1976).

73. An example of the latter, a prima facie case of disparate treatment in hiring, is established by proof that: (1) Complainant is member of a protected class, e.g. a racial minority, (2) Complainant applied and was qualified for position for which employer seeking applicants, (3) Despite qualifications, Complainant is rejected, and (4) Employer continues to seek applicants of Complainant's qualifications. Schlei & Grossman, Employment Discrimination Law 1298 (1983)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The presumption of illegal discrimination under this formula arises not because of any showing of different treatment of black and white applicants, but "because it eliminates the most likely legitimate causes for the employer's adverse action--a lack of minimum qualifications and the absence of a job opening. If these are not the causes, it is presumed that the employer's actions, unless otherwise explained, are more likely than not based on discrimination." Schlei & Grossman, Employment Discrimination Law at 1299.

74. Although the McDonnell-Douglas case set forth a specific pattern of facts which, if proven, establish a prima facie case of discrimination, it is well recognized that decision:

> did not purport to create an inflexible formulation. . . . 'The facts necessarily will vary in [employment discrimination] cases, and the specification . . . of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations." . . . The importance of McDonnell-Douglas lies not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any [employment discrimination] plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396, 429 (1977)(citing and quoting McDonnell Douglas Corp. v. Green, 411 U.S. at 802 n.13)). See Carson v. Bethlehem Steel Corp., 70 Fair Empl. Prac. Cas. 921, 922-23 (7th Cir. 1996)(proof of prima facie case "need not fit into a set of pigeon holes"--therefore race discrimination plaintiff need not show that replacement was of a different race).

75. A modification of the elements set forth in McDonnell Douglas to establish a prima facie case in failure to hire cases may be used to establish a prima facie case in a discharge case:

> (1) that he belongs to a group protected by the statute, (2) that he was qualified for the job from which he was discharged, (3) that, despite his qualifications, he was terminated, and (4) . . . that after his termination, the employer hired a person not in [complainant's] protected class or retained persons with comparable or lesser qualifications who are not in a protected group.

Wing v. Iowa Lutheran Hospital, 426 N.W.2d 175, 177 (Iowa Ct. App. 1988).

76. A prima facie case may also be established by showing:

> (1) he was a member of a protected class, (2) he was capable of performing the job, and (3) he was discharged from the job.

Smith v. Monsanto Chemical Co., 770 F.2d 719, 38 Fair Empl. Prac. Cases 1141, 1142 n.2 (8th Cir. 1985); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1253, 25 Fair Empl. Prac. Cases 1326 (8th Cir. 1981).

77. The burden of establishing a prima facie case of discrimination under the disparate treatment theory is not onerous. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Nonetheless, the phrase "prima facie case," as used here denotes that a "legally mandatory rebuttable presumption" of discrimination, id. at 254 n.7, must be established by a preponderance of the evidence. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986). The Complainant did so in this case. See Findings of Fact Nos. 85-87.

D. Respondents' Articulation, Through the Production of Evidence, of Legitimate Non-Discriminatory Reasons for Complainant's Termination and Replacement:

78. In order to rebut the Complainant's prima facie case, a Respondent must introduce admissible evidence which would allow the finder of fact to rationally conclude that the challenged decision was not motivated by discriminatory animus. Linn Co-operative Oil Company v. Quigley, 305 N.W.2d 728, 733 (Iowa 1981). The Respondent need not persuade the finder of fact that it was actually motivated by the proffered reasons. Id. Nonetheless, the Respondent must produce evidence that the action taken with respect to the Complainant was implemented "for a legitimate, nondiscriminatory reason." Hamilton v. First Baptist Elderly Housing Foundation, 436 N.W.2d 336, 338 (Iowa 1989). This burden cannot be met "merely through an answer to the complaint or through argument of counsel." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed. 2d. 207, 216 n.9 (1981)). This burden has been met here. See Finding of Fact No. 88.

E. Respondent's Reasons Were Not Shown to Be Pretexts for Discrimination: 79. There are a variety of ways in which it may be shown that an employer's articulated reasons are pretexts for discrimination, not all of which are enumerated below. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978); La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409, 36 Fair Empl. Prac. Cas. 913, 922 n.6 (7th Cir. 1984).

80.

> 30. [Pretext may be proven] by evidence showing:
>
> > (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the [challenged employment action], or (3) that the proffered reasons were insufficient to motivate the [challenged employment action].
>
> Bechold v. IGW Systems, Inc., 817 F.2d 1282, 43 Fair Empl. Prac. Cas. 1512, 1515 (7th Cir. 1987).

Ruth Miller, 11 Iowa Civil Rights Commission Case Reports 26, 48 (1990). Pretext in the instant case was not demonstrated by any of the above methods. See Findings of Fact No. 89-93.

81. The third method of showing pretext may be accomplished with regard to discipline and discharge through:

> evidence that the proffered reason for the [challenged employment action] was something so far removed in time from the [action] itself that it is unlikely to have been the whole cause, even if a part of it, or evidence that the proffered reason applied with equal or greater force to another employee who was not discharged [or disciplined].

La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1409, 36 Fair Empl. Prac. Cas. 913, 922 (7th Cir.1984). The Commission did not establish such facts. See Findings of Fact Nos. 90-102.

82. In this instance, with one exception, every employee, white or Black, who was known by Respondents Monfort to be the physical aggressor in a fight was discharged. See Findings of Fact Nos. 92-102. In that instance, it could be held that Complainant Tillman and William Mettlin, Jr. were not "similarly situated in all relevant respects," Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 972 (8th Cir. 1994), due to the different nature of the provocations which led them to become physical aggressors in fights. Usually, comparative circumstantial evidence supports an inference of discrimination when it shows that "employees similarly situated to the plaintiff other than in the characteristic (pregnancy, sex, race, or whatever) on which an employer is forbidden to base a difference in treatment received systematically better treatment." See Troupe v. May Department Stores Co., 20 F.3d 734, 736 (7th Cir. 1994)(emphasis added). That is not the case here. See Finding of Fact No. 101.

83. Under these facts, the differing provocations could also show a legitimate exercise of the employer's "discretion to consider all the facts and determine whether the discharge is an appropriate remedy or whether a milder punishment would be appropriate." Kendrick v. Commission of Zoological Subdistrict, 565 F.2d 524, 527 (8th Cir. 1977). See Finding of Fact No. 102.

F. Complainant Tillman's Physical Aggression Against Goken Was Not Justified As A Reasonable Response to Verbal Racial Harassment For Which The Employer Was Responsible:

84. As a general rule, it is well established that when a reason articulated for an employment action is based on employee conduct that results from discrimination for which the employer is responsible:

> [the] reason is ultimately "not legitimate because the Defendant employer created the problem initially." Lamb v. Smith International, Inc., 32 Empl. Prac. Dec. S 33770 at 30712, 30713, 32 Fair Empl. Prac. Cas. 105 (S.D. Tex. 1983)(discharge for poor work performance resulting from sexual harassment). This reasoning has

> been applied not only to situations where discriminatory or retaliatory practices have resulted in poor work performance, but also to cases where such practices have resulted in various forms of misconduct. See Ruth Miller, [11 Iowa Civil Rights Commission Case Reports 26, 44] (1990)(discharge of jailer for sleeping on the job found to be pretext where stress from discrimination and retaliation and discriminatory denial of shift change from midnight shift resulted in sleep loss); DeGrace v. Rumsfield, 21 Fair Empl. Prac. Cas. 1444, 1449 (1st Cir. 1980)(discharge for absenteeism resulting from racially hostile working environment); EEOC Decision No. 71-720, EEOC Decisions (CCH) S 6179 (1970)(discharge due to physical assault on supervisor resulting from racial harassment by supervisor). See also NLRB v. Vought Corporation, 788 F.2d 1378, (8th Cir. 1986)(discharge due to abusive language to supervisor resulting from warning given to employee who informed blacks that a white employee was being groomed to supervise a newly promoted black employee); Trustees v. NLRB, 548 F.2d 391, 393-94 (1st Cir. 1977)(discharge for repeated offensive behavior, including at one time brandishing scissors, where misconduct a response to employer hostility to employee's union activities); NLRB v. Mueller Brass Co., 501 F.2d 680, 686 (5th Cir. 1974)(discharge for abusive outburst at supervisor on receiving suspension resulting from employer's anti-union bias); and NLRB v. M & B Headwear Co., 349 F.2d 170, 174 (4th Cir. 1965)(failure to rehire employee due to outburst of anger resulting from layoff due to union activities).

Cristen Harms et. al. (Friedman Motorcars Cases), XI Iowa Civil Rights Commission Case Reports 89, 129 (1992)[discharge because employee lied to his employer as a result of retaliation inflicted by employer].

Dorothy Abbas, 12 Iowa Civil Rights Commission Case Reports 1, 21-22 (1994)(performance of personal work on city time resulted from employer's retaliatory reduction of duties), aff'd as modified sub nom City of Hampton v. Iowa Civil Rights Commission, No. 235/95-769, slip op. (Iowa September 18, 1996). See also Winbush v. State of Iowa, 69 Fair Empl. Prac. Cas. 1348, 1355, 1359 (8th Cir. 1995)(discharge for insubordination which resulted from racially hostile work environment for which employer was responsible); Avery v. Delchamps, Inc., 66 Fair Empl. Prac. Cas. 577, 577 (E.D. La 1994)(application of principle that "an employer cannot use an employee's diminished work performance as a legitimate basis for removal where the diminunition is the direct result of the employer's discriminatory behavior" in summary judgment decision where court had to assume that plaintiff stated a valid claim of racial harassment against employer and alleged discriminatory discharge was due to fight provoked by such harassment)(emphasis added); Tunis v. Corning Glass Works, 55 Fair Empl. Prac. Cas. 1655, 1661 (S.D.N.Y. 1988)(discharge due to "unfriendliness" and "disruptiveness" resulting from hostile environment of which employer was aware and did not remedy); . Broderick v. Ruder, 685 F. Supp. 1269, (D.D.C. 1988)(poor evaluations and threatened discharge due to deficient work performance resulting from sexually hostile environment for which employer was liable); Delgado v. Lehman, 43 Fair Empl. Prac. Cas. 593, 598, 600 (E.D. Va. 1987)(discharge due to diminished performance resulting from sexual harassment by employer); Weiss v. United States,

595 F. Supp. 1050, 1056 (E.D. Va. 1984)(discharge due to diminished performance resulting from religious harassment by employer).

85. In this case, however, the principle does not apply because, although there was racial harassment of Complainant Tillman, and the harassment did provoke the fight, the employer (i.e. Respondents Monfort) is not responsible for the harassment. The employer is not responsible for the harassment of Complainant Tillman which it knew about because the Commission has failed to prove that it did not take prompt and appropriate remedial action to remedy that harassment. The employer is also not responsible for other harassment of Complainant Tillman because the Commission failed to prove either that the employer knew or should have known about that harassment. See Conclusions of Law No. 38, 56-58, 61.

86. Even if the general principle did apply in this case, an exception to the principle would preclude a finding that Monfort's reason for the discharge of Complainant Tillman was a pretext for discrimination:

> Not every response by the victim of racial discrimination can be excused; actions may be so outside the parameters of reasonable conduct that they cannot be tolerated. See Higgins v. Gates Rubber Co., 578 F.2d 281 (10th Cir. 1978)(victim of racial harassment who responded by striking offending employee with metal bar was properly discharged for assault with a deadly weapon).

DeGrace v. Rumsfield, 614 F.2d 796, 806 (1st Cir. 1980). Under the facts of this case, the action undertaken by Complainant Tillman "was an adequate and legitimate cause for discharge" and "not shown . . . to be a pretext for discrimination." Higgins v. Gates Rubber Co., 578 F.2d 281, 284 (10th Cir. 1978). See Findings of Facts Nos. 103-05.

87. Thus, under the McDonnell Douglas analysis, the Commission has not met its burden of persuasion with regard to establishing a racially discriminatory discharge of Complainant Tillman by Respondents Monfort in violation of Iowa Code section 216.6.

VII EMOTIONAL DISTRESS:

A. Legal Authority For and Purpose of Power to Award Damages for Emotional Distress:

88. "[D]amages for emotional distress are recoverable under our civil rights statute." Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission, 453 N.W.2d 512, 525 (Iowa 1990). A victim of discrimination is to receive "a remedy for his or her complete injury," including damages for emotional distress. Id. at 525-26.

89. The Iowa Supreme Court's observations on the emotional distress resulting from wrongful discharge are equally applicable to the distress resulting from racial harassment:

> [Such action] offends standards of fair conduct . . . the [victim of discrimination] may suffer mentally. "Humiliation, wounded pride and the like may cause very acute mental anguish." [citations omitted]. We know of no logical reason why . . .

> damages should be limited to out-of- pocket loss of income, when the [victim] also suffers causally connected emotional harm. . . . We believe that fairness alone justifies the allowance of a full recovery in this type of tort.

Niblo v. Parr Mfg. Co., 445 N.W.2d 351, 355 (Iowa 1989).

90. The emotional distress sustained by the Complainant is substantial and serious Since even mild emotional distress resulting from discrimination is to be compensated, it is obvious that compensation must be awarded here. Darrell Harvey, 11 Iowa Civil Rights Commission Case Reports 65, 79 (1994); Alice Peyton, 11 Iowa Civil Rights Commission Case Reports 98, 124 (1994); Tammy Collins, 11 Iowa Civil Rights Commission Case Reports 128, 137 (1994); Stacey Davies, 11 Iowa Civil Rights Commission Case Reports 143, 157 (1994); Rachel Helkenn, 10 Iowa Civil Rights Commission Case Reports 62, 73 (1990); Robert E. Swanson, 10 Iowa Civil Rights Commission Case Reports 36, 45 (1989); Ann Redies, 10 Iowa Civil Rights Commission Case Reports 17, 28 (1989). See Hy Vee , 453 N.W.2d at 525-26(citing Niblo, 445 N.W.2d at 356-57)(adopting reasoning that because public policy requires that employee who is victim of discrimination is to be given a remedy for his complete injury, employee need not show distress is severe in order to be compensated for it)).

B. "Humiliation," "Wounded Pride," "Anger," "Hurt," "Frustration," "Discomfort," and "Upset" Are All Forms of Compensable Emotional Distress:

91. Among the many forms of emotional distress which may be compensated are "anger," "upset," "hurt," Kentucky Commission on Human Rights v. Fraser, 625 S.W.2d 852, 856 (Ky. 1981); 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24-29 (1982)(citing Fraser and 121-129 Broadway Realty v. New York Division of Human Rights, 49 A.D.2d 422, 376 N.Y.S.2d 17 (1975)); see also Gaudry v. Bureau of Labor & Industries, 617 P.2d 668, 670-71 (Or. Ct. App. 1980); "frustration," Gaudry, 617 P.2d at 670-71; see also Boals v. Gray, 577 F.. Supp. 288, 296 (N.D. Ohio 1983); "discomfort," id., "humiliation, wounded pride, and the like." Niblo, 445 N.W.2d at 355. See also Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 571 (8th Cir. 1989)(upset and hurt feelings); Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d 548, 550 (9th Cir. 1980)(upset).

C. Liberal Proof Requirements for Emotional Distress In Civil Rights Cases:

92. Emotional distress damages must be proven. Blessum v. Howard County Board of Supervisors, 295 N.W.2d 836, 845 (Iowa 1980); United States v. Balistrieri, 981 F.2d 916, 931 (7th Cir. 1992). These damages must be and have been proven here, as in any civil proceeding, by a preponderance or "greater weight" of the evidence and not by any more stringent standard. Iowa R. App. Pro. 14(f)(6).

93. "Because of the difficulty of evaluating the emotional injuries which result from deprivations of civil rights, courts do not demand precise proof to support a reasonable award of damages for such injuries." Block v. R.H. Macy & Co., Inc., 712 F.2d 1241, 1245 (8th Cir. 1983). Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 570 (8th Cir. 1989); Phillips v. Hunter Trails Community Assn., 685 F.2d 184, 190 (7th Cir. 1982).

94. This reasoning is consistent with the holding of the Iowa Supreme Court:

> [O]ur civil rights statute is to be liberally construed to eliminate unfair and discriminatory acts and practices. [Citation omitted]. We therefore hold a civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct.

Hy-Vee , 453 N.W.2d at 526 (emphasis added).

D. Emotional Distress May Be Proven By Direct Evidence or Circumstantial Evidence:

95. Emotional distress may be proved by direct evidence. E.g. Tallarico v. Trans World Airlines, Inc., 881 F.2d 566, 571 (8th Cir. 1989)("[emotional distress] may be evidenced by one's conduct and observed by others."). See United States v. Balistrieri, 981 F.2d 916, 932 (7th Cir. 1992)(plaintiff's testimony of humiliation cited as example of direct evidence of distress).

96. In this case there was direct evidence of the emotional distress caused Complainant by the racial harassment. This evidence took the form of his and others' testimony describing his distress and various manifestations of such distress reflected by his behavior. See Findings of Fact Nos.106-110, 112-13. Although other evidence is also relied upon in this case to establish the distress caused by the harassment, "[t]he [complainants'] own testimony may be solely sufficient to establish humiliation or mental distress." Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1273, 27 Fair Empl. Prac. Cases 487, 491 (8th Cir. 1981). See also Crumble v. Blumthal, 549 F.2d 462, 467 (7th Cir. 1977); Smith v. Anchor Building Corp., 536 F.2d 231, 236 (8th Cir. 1976); Phillips v. Butler, 3 Eq. Opp. Hous. Cas. § 15388 (N.D. Ill. 1981); Belton, Remedies in Employment Discrimination Law 415 (1992).

97. Emotional distress may also be established by circumstantial evidence. Tallarico v. Trans World Airlines, Inc., 881 F.2d at 571. See Howard v. Adkison, 887 F.2d 134, 139 (8th Cir. 1989)(damages may be proper because distress may be inferred from circumstantial evidence even where "the actual trial testimony contained no formal evidence of actual damage."); Sisneros v.. Nix, 884 F. Supp. 1313, 1344 (S.D. Iowa 1995)(same). See also Phiffer v. Proud Parrot Motor Hotel, Inc., 648 F.2d at 552 (race discrimination against Black male--distress inferred solely from the circumstances). Circumstances from which emotional distress may be inferred include the duration, severity and frequency of the harassment. See Finding of No.111.

98 Of course, both forms of evidence in this case must be weighed together when determining the existence, nature and extent of the emotional distress suffered by the complainant: "[Emotional distress] can be inferred from the circumstances as well as established by the testimony." Seaton v. Sky Realty, 491 F.2d 634, 636-37 (7th Cir. 1974)(quoted with approval in Blessum, 295 N.W.2d at 845 (Iowa 1980)). "[I]n determining whether the evidence of emotional distress is sufficient to support an award of damages, we must look at both the direct evidence of emotional distress and the circumstances of the act that allegedly caused that distress. . . . The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action; consequently, somewhat

more conclusory evidence of emotional distress will be acceptable to support an award for emotional distress." United States v. Balistrieri, 981 F.2d at 932, 933 (emphasis added)(holding that distress damage awards to housing discrimination testers were justified despite the "'somewhat general and conclusory nature" of their testimony because "racial discrimination . . . . is the type of action that one could reasonably expect to humiliate or cause emotional distress to a person."). Since racial harassment involves precisely those kinds of inherently degrading or humiliating actions from which distress may be inferred, the combination of those circumstances and somewhat conclusory testimony (weaker than the evidence in this case) will support an award of emotional distress damages. See id. This approach is consistent with Iowa law, which provides that, even where "the express testimony of distress is not strong," Dickerson v. Young, 332 N.W.2d 93, 99 (Iowa 1983), the presence of other facts which "would inevitably have a strong impact on the emotions of an individual" are substantial evidence of emotional distress. Id.

E. Determining the Amount of Damages for Emotional Distress:

99.

> [D]etermining the amount to be awarded for [emotional distress] is a difficult task. As one court has suggested, "compensation for damages on account of injuries of this nature is, of course, incapable of yardstick measurement. It is impossible to lay down any definite rule for measuring such damages.

2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 24-29 (1982)(quoting Randall v. Cowlitz Amusements, 76 P.2d 1017 (Wash. 1938)).

100. Although awards in other cases have little value in determining the amount an award should be in another specific case, Lynch v. City of Des Moines, 454 N.W.2d 827, 836-37 (Iowa 1990), one source lists many examples of such awards, ranging from $500 to $150,000, for emotional distress in discrimination cases. See e.g. Belton, Remedies in Employment Discrimination Law 416 n.78 (1992)(listing awards in 19 cases; 17 of which were for $10,000 or over; 12 of which were for $20,000 or over). Substantial awards have been allowed in Iowa. E.g. Pamela Farren v. Super Value Stores, Inc. , Law No. CL 100-57791, slip. op. at 22 (Polk County District Court February 24, 1994)(judge awarded $80,000 emotional distress damages in sex discrimination discharge case) ; While any award should be tailored to the particular case, one commentator has noted that "a $750 award for mental distress is 'chump change.' Awards must be made which are large enough to compensate the victim of discrimination adequately for the injury suffered." 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 60-61 (1982).

101. The Iowa Supreme Court recently held that an award of damages for emotional distress in the amount of $20,000 would be adequate in a case where the evidence of distress was based "almost solely" on the evidence of the complainant and her daughter evidencing that the complainant was "severely upset" and "experienc[ed] an inability to sleep" due to retaliatory threats made by her supervisor. City of Hampton v. Iowa Civil Rights Commission, No. 235/95-

769, slip op. at 9-10 (Iowa September 18, 1996)(reduction of award from $50,000). There was no medical or psychiatric evidence. Id. at 10.

102. Regardless of whether they are characterized as direct or circumstantial evidence, numerous facts have been identified which may indicate the presence and severity of emotional distress. See e.g. 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases 40-42 (1982). Undoubtedly, no complete listing of all such facts is possible. Nor could legal authority be found for each potentially relevant fact.

103. An award of damages for emotional distress may, however, be made in the absence of "evidence of economic or financial loss, or medical evidence of mental or emotional impairment." Seaton v. Sky Realty, 491 F.2d 634, 636 (7th Cir. 1974). See City of Hampton v. Iowa Civil Rights Commission, No. 235/95-769, slip op. at 10($20,000 awarded for emotional distress although there was no medical or psychiatric evidence). Nor need there be evidence of an effect on social activities. Marable v. Walker, 704 F.2d 1219, 1220 (11th Cir. 1983).

104. Nevertheless, the evidence of the adverse effect of the discrimination on the Complainant's work, the impact on his family life, his depression, the number of times the Complainant was exposed to behavior inducing embarrassment or humiliation, the discrimination's occurrence in the presence of others, the abusiveness of the actions and language directed toward the Complainant, and his feelings of anger or frustration are among those factors in this case which indicate the existence of serious and substantial emotional distress justifying an award of the magnitude made in this case. See Blessum, 295 N.W.2d at 845 (Iowa 1980)(effect on work, impact on family life); Fellows v. Iowa Civil Rights Commission, 236 N.W.2d 671, 676 (Iowa Ct. App. 1988)(depression); :Kentucky Comm'n On Human Rights v. Barbour, 587 S.W.2d 849, 852 (Ky. Ct. App. 1979)(number of times complainant exposed to behavior inducing embarrassment or humiliation; whether the acts of humiliation occurred in presence of others or otherwise resulted in public exposure; presence or absence of aggravating factors such as abusive language); 2 Kentucky Commission on Human Rights, Damages for Embarrassment and Humiliation in Discrimination Cases at 35, 40-42 (feelings of anger or frustration, effect on work, depression, loss of interest in or patience with one's spouse or children, exposure to outrageous or abusive conduct; number of times complainant exposed to discrimination; whether discriminatory acts occurred in presence of others). Cf. Dobbs, Handbook on the Law of Remedies 530-31 & n.24 (1973)("The amount of the recovery is usually based on the severity of the actions and language used by the defendant.")(quoting Sutherland v. Kroger Co., 110 S.E.2d 716 (W.Va. 1959)).

105.

> 45. The two primary determinants of the amount awarded for damages for emotional distress are the severity of the distress and the duration of the distress. Bean v. Best, 93 N.W.2d 403, 408 (S.D. 1958)(citing Restatement of Torts § 905). "'In determining this, all relevant circumstances are considered, including sex, age, condition of life, and any other fact indicating the susceptibility of the injured person to this type of harm.' And continuing 'The extent and duration of emotional distress produced by the tortious conduct depend upon the sensitiveness

> of the injured person.'" Id. (quoting Restatement of Torts S 905). [See also Restatement (Second) of Torts S 905 (comment i).]

Dorene Polton, 10 Iowa Civil Rights Commission Case Reports 152, 166 (1992). The severity and duration of distress, as well as other factors, were taken into account in making the damages award in this case.

106. The following factors were also taken into account in determining the amount of the award for emotional distress damages:

> 31. A wrongdoer takes the person he injures as he finds him. McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975). A previously disabled person injured by the acts of a wrongdoer "is entitled to such increased damages as are the natural and proximate result of the wrongful act." Id. at 46; Keeton, Prosser and Keeton on the Law of Torts 292 (1984). This principle applies to psychological and emotional injuries. McBroom v. State, 226 N.W.2d 41, 45 (Iowa 1975).
>
> 32. On the other hand, the wrongdoer is not required to pay damages for emotional distress resulting from sources completely independent of its conduct. See Keeton, Prosser and Keeton on the Law of Torts 292, 345, 348-50 (1984). Cf. Lynch v. City of Des Moines, 454 N.W.2d 827, 836 (Iowa 1990)(upholding award of emotional distress damages in sexual harassment case against appeal of damages as inadequate--noting some distress due to other turmoil in complainant's life unrelated to discriminatory actions of employer). With items such as pain and suffering, where the extent of the harm is almost incapable of definite proof, the factfinder is granted wide latitude in determining what amount of damage is attributable to the wrongdoer despite the absence of specific proof. Keeton, Prosser and Keeton on the Law of Torts 348- 350 & nn.47, 49 (1984).

Royd Jackman, XI Iowa Civil Rights Commission Case Reports 70, 82 (1991).See Finding of Fact 114.

VIII. HEARING COSTS:

107. An administrative rule of the Iowa Civil Rights Commission provides, in relevant part, that: "If the complainant or the commission prevails in the hearing, the respondent shall pay the 'contested case costs' incurred by the commission." 161 IAC 4.7(1). "Contested case costs" include only:

> a. The daily charge of the court reporter for attending and transcribing the hearing.
>
> b. All mileage charges of the court reporter for traveling to and from the hearing.
>
> c. All travel time charges of the court reporter for traveling to and from the hearing.
>
> d. The cost of the original of the transcripts of the hearing.

e. Postage incurred by the administrative law judge in sending by mail (regular or certified) any papers which are made part of the record.

161 IAC 4.7(3).

108. Since the Commission and the complainant have prevailed in this case against Respondent Goken, an order awarding contested case costs is appropriate. The record should be held open so a bill of costs may be submitted after this decision becomes final. Connie Zesch-Luense, 12 Iowa Civil Rights Commission Case Reports 160, 173 (1994).

DECISION AND ORDER

IT IS ORDERED, ADJUDGED, AND DECREED that:

A. All allegations in this case of race discrimination in employment against Respondents Monfort of Colorado, Inc. and Con Agra are dismissed.

B. The Iowa Civil Rights Commission and the Complainant, Edward D. Tillman, are entitled to judgment againnst Respondent Bret Goken because they have established that the prohibition against race discrimination in employment, set forth in Iowa Code section 216.6, was violated by Respondent Goken.

C. Complainant Tillman is entitled to a judgment of eight thousand five hundred dollars ($8500.00) in compensatory damages for the emotional distress he sustained as a result of the discrimination practiced by the Respondent.Bret Goken.

D. Interest at the rate of ten percent per annum shall be paid by Respondent Goken to the Complainant on the award of emotional distress damages commencing on the date this decision becomes final, either by Commission decision or by operation of law, and continuing until date of payment.

E. Respondent Goken is assessed all hearing costs allowed by 161 I.A.C. 4.7(3) and which were actually incurred in the processing of this public hearing. The precise calculation of costs shall be as shown on the bill of costs which is to be issued under the executive director's signature after this decision becomes final. The record shall be held open for this purpose.

Signed this the 30th day of September 1996.

_____

DONALD W. BOHLKEN
Administrative Law Judge
Department of Inspections and Appeals
2nd Floor, Lucas Bldg.
Des Moines, Iowa 50319-0083
515-281-8469

FAX: 515-281-4477

Final Order

On December 13, 1996, the Iowa Civil Rights Commission, at its regular meeting, adopted the Administrative Law Judge's proposed decision and order which is hereby incorporated in its entirety as if fully set forth herein.

IT IS SO ORDERED.

Issued this 13th day of December, 1996.

_____
Don Grove
Executive Director for
Iowa Civil Rights Commission Chairperson, Bernard Bidne